TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 218.

THE SHOSHONE MINING COMPANY, APPELLANT,

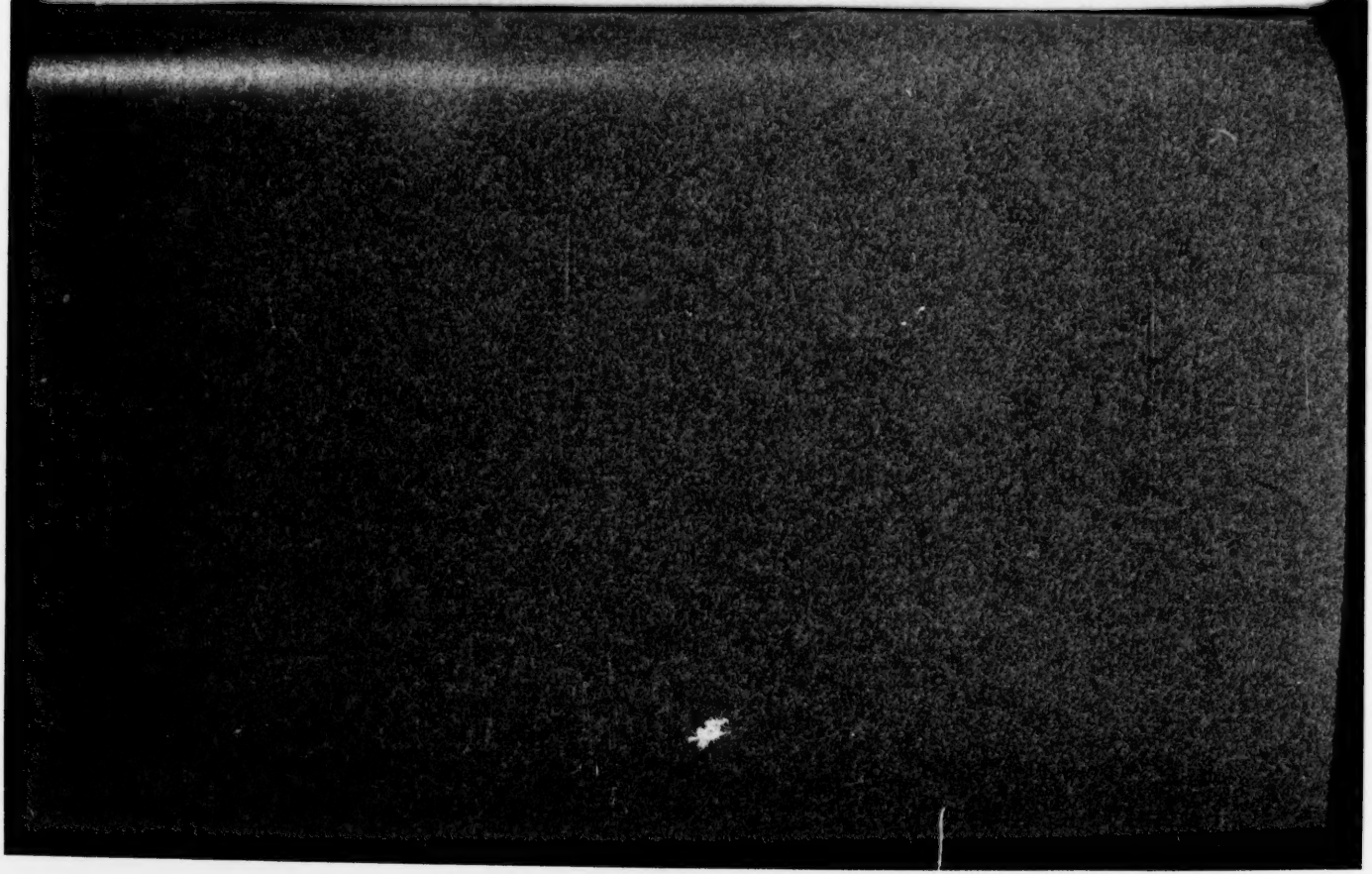
vs.

ROYAL J. RUTTER AND F. W. BRADLEY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

FILED FEBRUARY 16, 1903.

(17,294.)



(17,294.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 208.

THE SHOSHONE MINING COMPANY, APPELLANT,

vs.

ROYAL J. RUTTER AND F. W. BRADLEY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

INDEX.

	Original.	Print.
Order extending time to file transcript	1	1
Transcript from the United States circuit court for the district of Idaho	2	1
Bill of complaint	2	1
Exhibit A—Diagram	8*a*	4
Præcipe for subpœna	9	4
Subpœna	10	5
Marshal's return	12	5
Demurrer to bill	13	6
Appearance for defendant	17	8
First amended bill of complaint	18	8
Demurrer to first amended bill	28	13
Opinion on demurrer	31	15
Bill of exceptions No. 1	37	17
Exception to order on demurrer	37	18
Exception to amended bill	37	18
Answer of Shoshone Mining Co	39	18
Replication to answer	50	24
Second amended bill of complaint	52	24
Exhibit A—Diagram	62*a*	29

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 11, 1899.

	Original.	Print.
Opinion	63	29
Decree	73	34
Stipulation to settle bill of exceptions	76	36
Stipulation to hear cases together	77	36
Motion for rehearing	79	37
Bill of exceptions No. 2	82	38
Defendant's Exhibit 2—Notice of assessment-work on mining claims by the Bunker Hill and Sullivan Mining and Concentrating Co. in 1896	82	38
3—Proof of labor in 1896	85	40
4—Proof of labor in 1895	87	41
5—Notice of assessment-work in 1895	89	42
Exception to testimony of Royal J. Rutter	91	43
Exception to testimony of Frank C. Loring	93	44
Exception to decision of the court	94	45
Judge's certificate to bill of exceptions	104	49
Assignment of errors	105	50
Exhibit 4—Proof of labor, 1896	106	50
5—Notice of assessment, 1895	108	51
3—Proof of labor, 1896	110	53
2—Notice of assessment, 1896	113	54
Petition for appeal	128	61
Stipulation to consolidate cases Nos. 81 and 102 on appeal	129	62
Statement on appeal	131	62
Evidence in Rutter *et al. vs.* Shoshone Mining Co., No. 81	132	63
Plaintiffs' Exhibit A—Notice of location of Kirby claim	132	63
Testimony of R. J. Rutter	135	64
Plaintiffs' Exhibit B—Deed from Jas. Day *et al.* to R. J. Rutter, April 2, 1887	137	65
C—Deed from Jacob Johns *et al.* to R. J. Rutter, May 17, 1887	139	66
D—Deed from Jas. Day to R. J. Rutter, June 1, 1887	141	67
E—Notice of R. J. Rutter to Eugene Sullivan, January 14, 1893	143	68
Testimony of R. J. Rutter (resumed)	144	69
Jacob Johns	145	69
Defendant's Exhibit No. 1—Notice of location of the Edith claim	147	70
Testimony of Jacob Johns (redirect)	149	71
Frank C. Loring	149	71
Royal J. Rutter	158	76
Plaintiffs' Exhibit G—Receipt of J. E. Runnel to Rutter and Sullivan, December 28, 1883	160	77
H—Receipt of Faust and Wyatt to R. J. Rutter, December 26, 1887	160	77
I—Receipt of Jonah Hill to R. J. Rutter, October 30, 1892	161	77
J—Notice of intention to hold and work Kirby claim, November 18, 1893	161	78
K—Notice of intention to hold and work Kirby claim, November 5, 1894	162	78

	Original	Print.
Plaintiffs' Exhibit L—Proof of annual assessment of Kirby claim, December 9, 1895	164	79
Testimony of John L. Smith	168	81
Josiah Hill	172	83
R. J. Rutter (recalled)	173	84
Frank C. Loring (recalled)	173	84
J. M. Porter	174	84
F. W. Bradley	186	90
Joseph McDonald	198	96
N. S. Kellogg	201	98
Jarratt Jarratt	202	98
Albert Burch	203	98
Frederick Burbridge	204	99
W. H. Linney	205	99
F. W. Bradley	206	100
Plaintiffs rest	206	100
Defendant's motion to dismiss	207	100
Defendant's Exhibit No. 3—Notice of location of Shoshone claim	208	101
Testimony of W. Clayton Miller	211	102
Edward Sullivan	220	107
W. L. Spaulding	224	109
C. M. Fassett	225	109
Pat. Carey	226	110
John Conley	227	110
J. E. Boss	227	110
Defendant's Exhibit No. 6—Certificate of C. M. Fassett	229	111
Testimony of N. E. Lindsay	230	112
James H. Buskett	232	113
Charles Sweeney	234	114
Notice of assessment-work, 1896	235	114
Proof of labor, 1896	237	115
Proof of labor, 1895	239	116
Notice of assessment, 1895	240	117
Defendant rests	242	118
Testimony of F. C. Loring (recalled)	243	119
Albert Burch (recalled)	244	119
R. J. Rutter (recalled)	246	120
Josiah Hill (recalled)	246	120
J. M. Porter (recalled)	248	121
W. Clayton Miller (recalled)	248	121
Plaintiffs' Exhibit F—Deed from R. J. Rutter *et ux.* to F. W. Bradley, October 11, 1894	249	121
M—Proof of labor, Helen Marr lode, 1896	252	123
N—Certified copy of the adverse claim of R. J. Rutter and F. W. Bradley, owners of the Kirby Fraction mining claim, against the issuing of a patent to the Shoshone Mining Co. for a portion of the Shoshone and Summit Consolidated Lode claims	253	123

	Original.	Print.
Defendant's Exhibit 5—Deed from W. C. Miller to the Shoshone Mining Co., March 26, 1894	269	132
Evidence in Shoshone Mining Co. *vs.* Rutter *et al.*, No. 102	274	134
Plaintiff's Exhibit B—Notice of location of Ibex claim	275	134
Testimony of W. Clayton Miller	278	136
F. W. Bradley	282	138
F. W. Bradley (recalled)	295	144
Diagram	298*a*	146
Diagram	298*b*	146
Plaintiff's Exhibit C—Protest of Shoshone Mining Co. against application of Rutter *et al.* for patent to "Kirby Fraction"	299	146
Exhibit D—Notice of location of Ibex claim	319	156
Exhibit E—Abstract of title to Ibex lode and mining claim	322	158
Plaintiff's Exhibit D—Instruction given in Stemwinder Co. *vs.* Emma and Last Chance Co	333	158
Proceedings from record in case of Stemwinder Co. *vs.* Emma and Last Chance Co	335	159
Verdict	336	165
Judgment	337	165
Opinion	340	167
Defendants' Exhibit 2—Amended notice of location of the Stemwinder claim	350	171
3—Location notice of Stemwinder Lode claim	355	174
Judge's certificate to statement on appeal	358	175
Record in case of Shoshone Mining Co. *vs.* Rutter *et al*	359	176
Complaint	359	176
Exhibit A—Diagram	368*a*	180
B—Diagram	368*b*	180
Petition for removal	369	181
Bond for removal	373	182
Order for removal	376	184
Summons and return	377	184
Præcipe for default	381	186
Certificate of clerk of State court	382	186
Answer	383	187
Exhibit A—Diagram	397*a*	194
Replication	398	194
Stipulation as to time to prepare bill of exceptions	400	195
Opinion	401	196
Decree	402	196
Motion for rehearing	405	197
Transcript of testimony	408	199
Testimony of W. C. Miller	410	200
F. W. Bradley	417	204
F. W. Bradley (recalled)	431	211
Plaintiff's Exhibit A—Shoshone notice (not set out here	435	212
B—Notice of location of Ibex claim	435	213

	Original.	Print.
Plaintiffs' Exhibit C—Protest of Shoshone Mining Co.	438	214
Exhibit A—Abstract of title, &c.	451	221
Diagram	456*a*	223
Diagram	456*b*	223
Exhibit D—Notice of location, &c.	458	224
Exhibit E—Abstract of title, &c.	461	226
D—Proceedings in the Stemwinder case	472	231
Defendants' Exhibit 1—Map (not set out)	489	239
2—Amended notice of location of the Stemwinder claim	489	239
3—Location notice of Stemwinder Lode claim	494	241
Reporter's certificate to transcript of testimony	497	242
Judge's certificate to transcript of testimony	498	243
Record entries in both cases	498	243
Orders denying rehearing	499	243
Order consolidating causes	500	244
Order allowing appeal in No. 81	500	244
Order allowing appeal in No. 102	501	244
Bond on appeal	502	244
Citation and service	506	246
Order to transmit record	508	247
Clerk's certificate to transcript	509	247
Opinion	511	248
Dissenting opinion	526	256
Decree	530	258
Petition for appeal and allowance of same	531	259
Assignment of errors	532	259
Bond on appeal	539	263
Clerk's certificate	542	265
Citation	543	265

1 In the United States Circuit Court of Appeals for the Ninth Circuit.

ROYAL J. RUTTER and F. W. BRADLEY, Complainants,
vs.
THE SHOSHONE MINING COMPANY, a Corporation, Defendant. } No. 81.

THE SHOSHONE MINING COMPANY, a Corporation, Complainants,
vs.
ROYAL J. RUTTER and F. W. BRADLEY, Defendants. } No. 102.

Order Extending Time to File Transcript.

2 For good cause shown it is hereby ordered that the time to docket the above-entitled causes and file the record thereof in this court be, and the same is hereby, extended from the 9th day of December, 1897, to and including the 9th day of January, 1898.

Dated this 6th day of December, 1897.

BEATTY, *Judge.*

(Endorsed:) Filed Dec. 13, 1897. F. D. Monckton, clerk.

Bill in Equity.

In the Circuit Court of the United States in and for the Northern Division of the District of Idaho.

ROYAL J. RUTTER and F. W. BRADLEY, Complainants,
vs.
THE SHOSHONE MINING COMPANY, a Corporation, Defendant.

Bill of complaint.

To the judges of the circuit court of the United States for the northern division of the district of Idaho:

3 Comes now your orators, Royal J. Rutter and F. W. Bradley, citizens and residents of the State of Idaho and of the northern division of the district of Idaho, and bring this bill against the Shoshone Mining Company, a corporation doing business in said district as such, and thereupon your orators complain and allege:

That your orators are each citizens of the United States and the State of Idaho, and residents of the county of Shoshone, State of Idaho, and that the Shoshone Mining Company is a corporation engaged in business as a mining corporation, and having agents in charge thereof at Wardner, in the said county of Shoshone, State and district of Idaho.

Your orators further allege that long prior to the 20th day of August, 1895, your orators were, ever since have been, and now are the owners (subject only to the paramount title of the United States) and in the possession of that certain mine and mining claim containing a lode of rock in place, bearing silver, lead, and other valuable minerals and metals, situate in Yreka mining district, Shoshone county, State of Idaho, called the Kirby Fraction Lode mining claim, and more particularly described as follows: Commencing at a post called post No. 1 of said claim, firmly planted in the earth; thence running north 79 degrees 28 minutes west to a post called post No. 2 of said claim, a distance of 857.2 feet; thence south 16 degrees 13 minutes west, 539.3 feet to post No. 3 of
4 said claim; thence north 84 degrees 27 minutes east, 918.5 feet to post No. 4, from which point the quarter-section corner between sections 12 and 13 of township 48, north range 2, E. B. M., United States surveys, bears south 51 degrees 58 minutes east, 606.8 feet distant; thence from said post No. 4 on a course north 16 degrees 13 minutes east, 283.6 feet to corner post No. 1, and place of beginning, and comprising an area of 8.057 acres.

That the defendant, claiming to be the owner of an alleged adjacent mining claim called the "Shoshone mining claim," on or about the — day of August, 1895, wrongfully caused said Shoshone mining claim to be so surveyed as to crop upon and overlap the said Kirby Fraction Lode mining claim and to include a portion thereof, described as follows: Commencing at a point 457.58 feet from corner No. 1 of said Kirby Fraction mining claim, as described on the westerly line thereof, thence running north 79 degrees 28 minutes west, 399.45 feet to post No. 2 of said Kirby Fraction Lode mining claim; thence south 16 degrees 13 minutes west, 447.56 feet to a point; thence south 51 degrees 56 minutes east, 105.1 feet to a point; thence north 82 degrees 55 minutes east, 376.9 feet to a point; thence north 41 degrees east, 355.9 feet to a point; thence north 58 degrees 19 minutes west, 202.76 feet to the point of commencement, and containing 5.16 acres, the boundaries whereof are particularly indicated by the red lines on the diagram hereto annexed and marked Exhibit "A" and made part of this bill.
5 That on or about the 24th day of August, 1895, the said defendant filed the field-notes and a diagram of this survey of the alleged Shoshone mining claim, and also an application for a United States patent for said mining claim in conjunction with one alleged other mining claim called by it the "Summit," under the name of the Shoshone and Summit Consolidated quartz mining lodes and claims, in the United States land office, at Cœur d'Alene city, Idaho, and caused the register and receiver of said land office to give notice of said application for patent by publication in the "Wardner News," a newspaper published in the vicinity as required by law.

That in and by said application for patent the defendant set up and wrongfully alleged that it was the owner and in possession of the whole of said Shoshone mining claim, inclusive of the premises last above described, and of the lode therein part of the Kirby

Fraction lode and mining claim, and the property and in the possession of the complainants. That your orators, during the sixty days' period of publication of the notice of application for patent for said alleged Shoshone and Summit Consolidated lodes and mining claims filed in said land office, under the oath of the said Royal J. Rutter, acting in behalf of your orators, a protest and adverse claim to said application and for said last-described premises and the lode therein, in due form showing the nature, extent
6 and boundaries of the adverse claim of your orators; and thereupon proceedings on said application in said land office were and are stayed to await the determination by a court of competent jurisdiction of the right of possession of said last-described premises and the rights of the respective parties therein and thereto, and to that end the complainants bring this suit, and a period of thirty days not having elapsed since the filing of said protest and adverse claim.

That the defendant maintains and prosecutes said application for patent to the premises in conflict and to the Shoshone mining claim, and thereby the title and possession of your orators in and to the premises described, being the area thus brought in conflict between the Kirby Fraction Lode mining claim and the alleged Shoshone mining claim, are wrongfully imperiled, clouded, and incumbered, and the value of your complainants' estate and property therein is greatly depreciated to their great damage and injury, and that the value of the premises in conflict is more than one thousand dollars, exclusive of interest and costs.

That the said defendant pretends and gives out that the location of said Kirby Fraction mining claim, though made upon the ground in the manner required by law and duly recorded by the complainants' grantors and predecessors in interest, and at a date long prior to the pretended location of said Shoshone mining claim, was invalid and ineffectual to appropriate said premises, and that
7 the pretended location of the said Shoshone mining claim was made upon unoccupied public mineral land at its alleged date, all of which pretensions are false and untrue.

Wherefore, your orators pray:

First. That the said defendant may be compelled to answer all and singular the premises in this bill, but not under oath (answer under oath being hereby expressly waived), and that relief be ordered and decreed to your orators as follows:

That the complainants are the owners of and entitled to the premises in conflict as described herein, and of the lode therein and granting and confirming the complainants' title thereto and possession thereof; that the defendant, The Shoshone Mining Company, has no title to or right of possession of said conflict area or of the lode therein, or of any part thereof.

That the defendant be restrained and enjoined, pending this action, and upon trial perpetually, from entering in or on said conflict area or the lode therein or any part thereof, or mining in or extracting any ore bodies or minerals therefrom, and from in any way interfering with the possession thereof; and for such other and

further relief as may be consistent with the equity of the case; and your orators further pray that your honors will grant to your orators the writ of subpœna issuing out of and under the seal of this court to the said Shoshone Mining Company, commanding it
8 by a certain day to appear before your honors in the court aforesaid, and there and then answer these premises and abide the further order and direction of this court.

JOHN R. M'BRIDE,
Solicitor for Complainants.

JOHN R. M'BRIDE, *Counsel.*

STATE OF IDAHO, }
County of Shoshone, } ss:

Royal J. Rutter and F. W. Bradley, each being first duly sworn according to law, deposes and says that he is one of the complainants in the above-entitled action, has read the foregoing bill of complaint, knows the contents thereof, and that the same are true of his own knowledge, except such matters and things as are stated upon information or belief, and as to those things he believes them to be true.

ROYAL J. RUTTER.
F. W. BRADLEY.

Subscribed and sworn to before me this 12th day of November, 1895.

[SEAL.]

M. J. SINCLAIR,
Notary Public.

(Endorsed:) Original. No. 81. In the U. S. circuit court, district of Idaho, northern division.

(Here follows diagram marked page 8*a*.)

9 Royal J. Rutter and F. W. Bradley, plaintiffs, *vs.* The Shoshone Mining Company, defendant. Bill of complaint. Filed Nov. 15th, 1895. A. L. Richardson, clerk, by E. R. Wiswell, deputy. J. R. McBride, Ziegler block, Spokane, Wash., attorney for plaintiffs.

In the Circuit Court of the United States, District of Idaho, Northern Division.

ROYAL J. RUTTER and F. W. BRADLEY, Complainants, }
vs.
THE SHOSHONE MINING COMPANY, Defendant. }

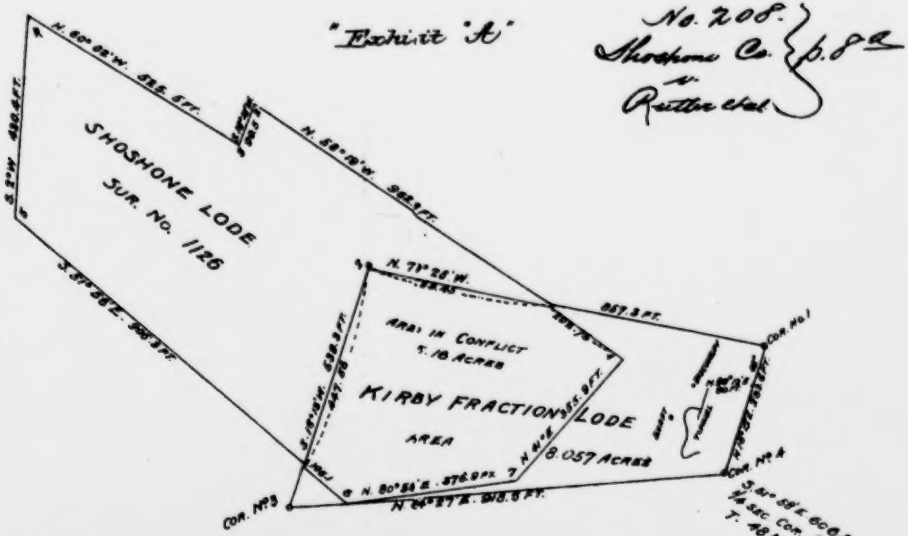
Præcipe for Subpœna.

You will please issue a subpœna to the defendant in the above suit, returnable on the first Monday in January, 1896.

JOHN R. M'BRIDE,
Solicitor for Complainants.

"Exhibit "A"

No. 208.
Shoshone Co. } ft. 8 Q
v.
Rattler Lod


N. 60° 22' W. 976.5 FT.
S. 2° W. 498.5 FT.
SHOSHONE LODE
SUR. No. 1126
N. 58° 12' W. 988.3 FT.
S. 31° 38' E. 968.3 FT.
N. 71° 28' W.
AREA IN CONFLICT
7.18 ACRES
KIRBY FRACTIONS LODE
AREA
8.057 ACRES
857.3 FT.
COR. No. 1
COR. No. 2
COR. No. 3
COR. No. 4
N. 80° 55' E. 576.9 FT.
N. 64° 27' E. 548.5 FT.
S. 61° 58' E. 660.8 FT. TO NE SEC. COR. SEC. 12 & 13 T. 48 N. R. 2 E.

I hereby certify that the above diagram correctly represents the conflict claimed to exist between the Shoshone Lode and the Kirby Lode as actually surveyed by me. And I further certify that the value of the labor and improvements on the Kirby Lode made by the adverse claimants and their grantors is not less than five hundred dollars

Wallace, Idaho
Oct. 31st 1895

James M. Porter
U.S Deputy Min. Sur.

10 (Endorsed:) No. 81. U. S. circuit court, district of Idaho, N. D. Rutter *et al. vs.* Shoshone M. Co. Præcipe for subpœna. Filed Nov. 15, 1895. A. L. Richardson, clerk, by E. R. Wiswell, deputy. John R. McBride, Spokane, Wash., solicitor for complainants.

In the Circuit Court of the United States for the Northern Division, District of Idaho. In Equity.

ROYAL J. RUTTER and F. W. BRADLEY, Complainants,
vs.
THE SHOSHONE MINING COMPANY, a Corporation, Defendant. } No. 81.

Subpœna ad Respondendum.

The President of the United States of America to the Shoshone Mining Company, a corporation, Greeting:

You, and each of you, are hereby commanded that you be and appear in said circuit court of the United States, at the court-room thereof, in Moscow, Idaho, in said district, on the first Mon-
11 day of January next, which will be the 6th day of January, A. D. 1896, to answer the exigency of a bill of complaint exhibited and filed against you in our said court, wherein Royal J. Rutter and F. W. Bradley are complainants and you are defendant, and further to do and receive what our said circuit court shall consider in this behalf, and this you are in nowise to omit under the pains and penalties of what may befall thereon.

And this is to command you, the said marshal of said district, or your deputy, to make due service of this our writ of subpœna, and to have then and there the same.

Hereof fail not.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of our said circuit court, affixed at Moscow, in said district, this 15th day of November, in the year of our Lord, one thousand eight hundred and ninety-five, and of the Independence of the United States the one hundred and twentieth.

[SEAL.]

A. L. RICHARDSON, *Clerk*,
By E. R. WISWELL,
Deputy Clerk.

Memorandum pursuant to equity rule No. 12 of the Supreme Court of the United States.—The defendant is to enter his appearance in the above-entitled suit in the office of the clerk of said court on or before the day at which the above writ is returnable; otherwise the complainant's bill therein may be taken *pro confesso*.

12 I hereby certify that I received the within subpœna on the 15th day of Nov., 1895, and personally served the same on the 20th day of Nov., 1895, on the Shoshone Mining Company, a

corporation, being the defendants named in said subpœna, by delivering to and leaving with W. B. Sama, secretary of said mining company, said defendant, personally, at Osborn, in Shoshone county, district of Idaho, a copy of said subpœna and a certified copy of the complaint in the action named in said subpœna attached to said copy.

Fees	$4.00
Mileage	17.28
Total	$21.28

J. I. CRUTCHER,
U. S. Marshal,
By L. D. MARTIN, *Deputy.*

(Endorsed:) Original. No. 81. In the circuit court of the United States for the northern division of the district of Idaho. In equity. Royal J. Rutter and F. W. Bradley *vs.* The Shoshone Mining Coming. *Subpœna ad respondendum.* Returned and filed Nov. 22d, 1895. A. L. Richardson, clerk, by E. R. Wiswell, deputy clerk.

13 In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the District of Idaho, Northern Division. In Equity.

ROYAL J. RUTTER and F. W. BRADLEY, Complainants,
vs.
THE SHOSHONE MINING COMPANY, a Corporation, Defendant.

Demurrer to Bill.

The demurrer of the Shoshone Mining Company to the original bill of complaint of Royal J. Rutter and F. W. Bradley, complainants.

This defendant, The Shoshone Mining Company, by protestation, not confessing or acknowledging all or any of the matters or things in said bill of complaint contained to be true, in such manner and form as the same are therein set forth and alleged, demurs to the said bill, and for cause of demurrer says:

14 I.

That a compliance has not been made in said bill with any of the requisites of rule 20 of the equity rules of this court.

II.

That the defendant's residence or place of abode is not stated in said bill.

III.

That the said bill is deficient in certainty, in this: that it does not state under the laws of what State or under what laws the defendant is incorporated or has any legal existence.

IV.

That it appears upon the face of the bill that the plaintiffs have an adequate remedy at law.

V.

That the said plaintiffs have not in or by the said bill made or stated such a cause as doth or ought to entitle them to any such discovery or relief as is thereby sought or prayed for, from or against this defendant.

15 VI.

That the value of the subject-matter of the plaintiffs' action is beneath the dignity of the court, in that it does show by the bill that the matter in dispute exceeds, exclusive of interests and costs, the sum of two thousand dollars.

VII.

Because the said bill does not show on its face any diverse citizenship between the parties complainant and defendant.

VIII.

Because the bill does not show on its face that the action is one arising under the Constitution or laws of the United States.

Wherefore, this defendant demands the judgment of this honorable court whether it shall be compelled to make any further answer to the said bill or to any of the matters and things therein contained, and prays to be hence dismissed with its reasonable costs in this behalf sustained.

Osburn, Idaho.

W. B. HEYBURN,
Solicitor and of Counsel for the Defendant,
The Shoshone Mining Company.

16 I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

Osburn, Idaho, Nov., 1895.

W. B. HEYBURN,
Of Counsel for Defendant.

STATE OF IDAHO, }
County of Shoshone, Northern District of Idaho, } *ss:*

E. M. Gilpin, being first duly sworn, deposes and says: I am president of The Shoshone Mining Company, the above named defendant. The foregoing demurrer is not interposed for delay.

E. M. GILPIN.

Subscribed and sworn to before me this 27th day of November, A. D. 1895.

[SEAL.]

E. M. HEYBURN,
Notary Public.

(Endorsed:) No. 81. In the United States circuit court, ninth judicial circuit, in and for the district of Idaho, northern division. Royal J. Rutter *et al.*, complainants, *vs.* The Shoshone Mining Co., defendant. Demurrer (original). Filed Dec. 7th, 1895. A. L. Richardson, clerk. W. B. Heyburn, solicitor for complainant and of counsel.

17 In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the District of Idaho, Northern Division.

ROYAL J. RUTTER and F. W. BRADLEY, Complainants,
vs.
THE SHOSHONE MINING COMPANY, a Corporation, Defendant.

Appearance for Defendant.

To the clerk of the above-entitled court:

You will please enter my appearance as counsel for the defendant in the above-entitled cause.

Osburn, Idaho.

W. B. HEYBURN,
Solicitor for Defendant and of Counsel.

(Endorsed:) No. 81. In the United States circuit court, ninth judicial circuit, in and for the district of Idaho, northern division. Royal J. Rutter *et al. vs.* The Shoshone Mining Co., defendant. Appearance. Filed Dec. 7th, 1895. A. L. Richardson, clerk. W. B. Heyburn, solicitor for defendant and of counsel, Osburn, Idaho.

18 In the Circuit Court of the United States in and for the Northern Division of the District of Idaho.

ROYAL J. RUTTER and F. W. BRADLEY, Complainants,
vs.
THE SHOSHONE MINING COMPANY, a Corporation, Defendant.

First Amended Bill of Complaint.

To the judges of the circuit court of the United States for the northern division of the district of Idaho:

Come now your orators, Royal J. Rutter and F. W. Bradley, citizens and residents of the State of Idaho, and of the northern division of the district of Idaho, and bring this bill against the Shoshone Mining Company, a corporation doing business in said district as such, and thereupon your orators complain and allege:

That your orators are each citizens of the United States and the State of Idaho, and residents of the county of Shoshone, State of Idaho, and that the Shoshone Mining Company is a corporation,
19 organized and existing under the laws of the State of Idaho, and a citizen thereof, engaged in business as a mining corporation, and having agents in charge thereof at Wardner, in the said county of Shoshone, State and district of Idaho.

Your orators further allege that long prior to the 20th day of August, 1895, your orators were, ever since have been, and now are the owners (subject only to the paramount title of the United States) and in the possession of that certain mine and mining claim containing a lode of rock in place bearing silver, lead, and other valuable minerals and metals, situate in Yreka mining district, Shoshone county, State of Idaho, called the Kirby Fraction lode and mining claim, and more particularly described as follows: Commencing at post called post No. 1 of said claim, firmly planted in the earth; thence running north 79 degrees 28 minutes west to a point called post No. 2 of said claim, a distance of 827.2 feet; thence south 16 degrees 13 minutes west, 539.3 feet to post No. 3 of said claim; thence north 84 degrees 27 minutes east, 918.5 feet to post No. 4, from which point the quarter-section corner between sections 12 and 13 of township 48, north range 2, E. B. M., United States survey, bears south 51 degrees 58 minutes east, 606.8 feet distant; thence from said post No. 4 on a course north 16 degrees 13 minutes east, 283.6 feet, to corner post No. 1 and place of beginning, and comprising an area of 8.057 acres. But on the 11th day of July, 1886, whilst the premises above described were vacant, unoccupied, public mineral lands, open to exploration and location by citizens
20 of the United States, James Day, Jacob Johns, Ed. Sullivan, Elar Charlebois, each being a citizen of the United States, above the age of twenty-one years, went upon said premises and discovered therein a lode of rock in place bearing silver, lead, and other valuable metals and minerals, and located the same as a mining claim. That they proceeded to erect monuments upon said claims to mark the boundaries thereof upon the surface, so that they could be readily traced. That at the place of discovery of the minerals upon said claim they posted a notice describing the same, which notice was afterward duly verified by one of the said locators as required by law, and on the 13th day of July, 1886, filed for record in the office of the mining recorder of said mining district, and afterward, on the 8th day of September of the same year, recorded in the office of the recorder of said Shoshone county, which record of the location, with the affidavit and the certificate of said recorder of the mining district and the county of Shoshone, are as follows:

Notice of Location of Quartz Claim.

Notice is hereby given to all whom it may concern that James Day, Jacob Johns, Ed. Sullivan, Elar Charlebois, citizens of the United States, over the age of twenty-one years, having discovered a vein of lode of quartz or rock in place bearing mineral within the limits of the claim hereby located, have this day, under and in accordance with the Revised Statutes of the United States,
21 chapter six, title thirty-two, located 1,400 feet (fourteen hundred feet), linear feet of this vein or lode, with surface ground 400 feet (four hundred feet) in width, situated in the Yreka mining district, county of Shoshone, and known as the Kirby Fraction quartz mining claim, and extending 1,250 feet (twelve hundred and

fifty) westward direction, and one hundred and fifty (150) in an easterly direction, and two hundred on each side from this notice at the discovery or prospect shaft, which is one hundred and fifty feet from the east end line, the exterior boundaries of this claim being distinctly marked by reference to some natural objects or permanent monuments, and more particularly described as follows, to wit: Starting at this notice and running 150 feet westerly to post marked east center end; thence northerly 200 feet to post marked northeast corner; thence westerly 1,400 feet to post marked northwest corner; thence southerly 200 feet to post marked southwest corner; thence 1,400 feet easterly to post marked northeast corner; thence northerly 200 feet to post marked east center end or place of beginning. One-half mile west of Wardner and on the west slope of Milo creek, bounded on the north by the Last Chance lode, and on the east by what is known as the Emma lode.

Located this 11th day of July, 1886.

JAMES DAY,
ED. SULLIVAN,
JACOB JOHNS,
ELAR CHARLEBOIS, *Locators.*

22 TERRITORY OF IDAHO, } ss.:
County of Shoshone, }

I, Jacob Johns, do solemnly swear that I am acquainted with the mining ground described in the notice of location herewith, called the Kirby Fraction ledge, lode, or claim, and that the ground and claim therein described, or any part thereof, has not to the best of my knowledge and belief been heretofore located according to the laws of the United States and of this Territory, or if so located that the same has been abandoned by reason of the failure of such former locators to comply in respect thereto with the requirements of said laws.

JACOB JOHNS.

Subscribed and sworn to before me this 13th day of July, 7.30 p. m., 1886.

L. F. ROBERTSON,
Deputy Recorder.

Filed for record this 13th day of July, 1886, at 7.30 p. m., at the request of Jacob Johns, recorded in Book "B" of Quartz Locations, Yreka District, page 229.

L. F. ROBERTSON,
Deputy Recorder.

Recorded at the request of L. F. Robertson, September 8th, 1886, at 5 p. m.

THOS. E. M'LELLAND,
County Recorder,
By M. J. SWEENEY, *Deputy.*

That thenceforward and thereafter the said locators and their grantees have each and every year performed the work and labor upon said premises of the amount of more than $100, and by certain conveyances from said locators to complainants they have succeeded to all the rights of said original locators. That the description of said Kirby Fraction lode as first above given herein is entirely within the limits and boundaries fixed by said original location and notice, and that no point passes beyond the said original boundaries as located by said Kirby Fraction Lode locators, and the said complainants herein, and their predecessors in interest, have done and performed all the acts and things required by law to enable them to hold and possess the said claim according to law from the date of said location until the present time.

That the defendant, claiming to be the owner of an alleged adjacent mining claim called the "Shoshone mining claim," on or about the — day of August, 1895, wrongfully caused the said Shoshone mining claim to be so surveyed as to crop upon and overlap the said Kirby Fraction Lode mining claim, and to include a portion thereof, described as follows: Commencing at a point 57 degrees 58 minutes — feet from corner No. 1 of said Kirby Fraction mining claim, as described on the easterly line thereof; thence running north 79 degrees 28 minutes west, 399.45 feet to post No. 2 of said Kirby Fraction Lode mining claim; thence south 16 degrees 13 minutes west, 447.56 feet to a point; thence south 51 degrees 56 minutes
24 east, 105.1 feet to a point; thence north 82 degrees 55 minutes east, 376.9 feet to a point; thence north 41 degrees, 355.9 feet to a point; thence north 58 degrees 19 minutes west, 202.76 feet to the point of commencement, and containing 5.16 acres, the boundaries whereof are particularly indicated by the red lines on the diagram hereto annexed and marked Exhibit "A," and made part of this bill.

That on or about the 24th day of August, 1895, the said defendant filed the field notes and a diagram of this survey of the alleged Shoshone mining claim, and also an application for a United States patent for said mining claim in conjunction with one other alleged mining claim, called by it the "Summit," under the name of the Shoshone Consolidated quartz mining lodes and claims, in the United States land office at Cœur d'Alene city, Idaho, and caused the register and receiver of said land office to give notice of said application for patent by publication in the "Wardner News," a newspaper published in the vicinity as required by law.

That in and by said application for patent the defendant set up and wrongfully alleged that it was the owner and in the possession of the whole of said Shoshone mining claim, inclusive of the premises last above described, and of the lode therein, part of the Kirby Fraction lode and mining claim, and the property and in the possession of the complainants. That your orators, during the sixty days' period of publication of the notice of application for patent for said alleged Shoshone and Summit Consolidated lodes and mining
25 claims, filed in said land office, under oath of the said Royal J. Rutter, acting in behalf of your orators, a protest and ad-

verse claim to said application, and for said last-described premises and the lode therein in due form, showing the nature, extent and boundaries of the adverse claim of your orators, and thereupon proceedings on said application in said land office were and are stayed to await the determination by a court of competent jurisdiction, of the right of possession of said last-described premises, and the rights of the respective parties therein and thereto, and to that end the complainants bring this suit, and the period of thirty days not having elapsed since the filing of said protest and adverse claim.

That the defendant maintains and prosecutes said application for patent to the premises in conflict and to the said Shoshone mining claim, and thereby the title and possession of your orators in and to the premises described, being the area thus brought in conflict between the Kirby Fraction Lode mining claim and the alleged Shoshone mining claim, are wrongfully imperiled, clouded, and incumbered, and the value of your complainant's estate and property therein is greatly depreciated, to their great damage and injury. And that the ground in conflict is of the value of more than $10,000, exclusive of interests and costs.

That the said defendant pretends and gives out that the
26 location of said Kirby Fraction mining claim, though made upon the ground in the manner required by law and duly recorded by the complainants' grantors and predecessors in interest, and at a date long prior to the pretended location of the Shoshone mining claim, was invalid and ineffectual to appropriate said premises, and that the pretended location of the Shoshone mining claim was made upon unoccupied public mineral land at its alleged date, all of which pretensions are false and untrue, and that for these injuries there is no plain, speedy, or adequate remedy at law.

Wherefore, your orators pray:

First, that the said defendant may be compelled to answer all and singular the premises in this bill, but not under oath (answer under oath being hereby expressly waived), and that relief be ordered and decreed to your orators as follows:

That the complainants are the owners of and entitled to the premises in conflict as described herein, and of the lode therein, and granting and confirming the complainants' title thereto and possession thereof; that the defendant, The Shoshone Mining Company, has no title to or right of possession of said conflict and of the lode therein or of any part thereof.

That the defendant be restrained and enjoined, pending this action, and upon trial perpetually, from entering in or on said conflict or the lode therein or any part thereof, or mining in or contracting any ore bodies or minerals therefrom, and from in any way interfering with the possession thereof; and for such other
27 and further relief as may be consistent with the equity of the case. And your orators further pray that your honors will grant to your orators the writ of subpœna issuing out of and under the seal of this court to the said Shoshone Mining Company, commanding it by a day certain to appear before your honors in

the court aforesaid, and there and then answer these premises and abide the further order and direction of the court.

JOHN R. M'BRIDE,
Complainants' Solicitor.

JOHN R. M'BRIDE, *Counsel.*

STATE OF WASHINGTON, } ss:
County of Spokane, }

F. W. Bradley, being first duly sworn according to law, deposes and says that he is one of the complainants in the above-entitled action, and has read the foregoing bill of complaint, knows the contents thereof, and that the same are true of his own knowledge, except such matters and things as are stated upon information or belief, and as to those things he believes them to be true.

F. W. BRADLEY.

Subscribed and sworn to before me this 26th day of May, 1896.
[SEAL.] SAMUEL R. STERN,
Notary Public, Residing at Spokane, Wash.

28 (Endorsed:) No. 81. In the U. S. circuit court, district of Idaho, N. D. Royal J. Rutter and F. W. Bradley, plaintiffs, *vs.* The Shoshone Mining Company, a corporation, defendant. Amended bill. Filed May 11, 1896. A. L. Richardson, clerk. McBride & Stoll, Ziegler block, Spokane, Wash.

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the District of Idaho, Northern Division.

ROYAL J. RUTTER and F. W. BRADLEY, Complainants, }
vs.
THE SHOSHONE MINING COMPANY, a Corporation, Defendant. }

Demurrer to First Amended Bill.

The demurrer of the Shoshone Mining Company to the amended bill of complaint of Royal J. Rutter and F. W. Bradley, complainants.

This defendant, The Shoshone Mining Company, by protestation, not confessing or acknowledging all or any of the matters or
29 things in said bill of complaint contained to be true, in such manner and form as the same are therein set forth and alleged, demurs to the said bill and for cause of demurrer says:

1st.

That it appears upon the face of the bill that the plaintiffs have an adequate remedy at law.

2d.

That the said plaintiffs have not in or by the said bill made or stated such a cause as doth or ought to entitle them to any such dis-

covery or relief as is thereby sought or prayed for, for or against this defendant.

3d.

Because the bill does not show on its face that the action is one arising under the Constitution or laws of the United States.

Wherefore, this defendant demands the judgment of this honorable court whether it shall be compelled to make any further answer to the said bill, or to any of the matters and things therein contained, and prays to be hence dismissed, with its reasonable costs in this behalf sustained.

W. B. HEYBURN,
Solicitor and of Counsel for the Defendant,
The Shoshone Mining Company.

Address, Osburn, Idaho.

I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

W. B. HEYBURN,
Of Counsel for Defendant.

Osburn, Idaho, May 11, 1896.

STATE OF IDAHO, }
County of Shoshone, Northern District of Idaho, } ss:

W. B. Heyburn, being first duly sworn, deposes and says: I am the vice-president of The Shoshone Mining Company, the above-named defendant; that the foregoing demurrer is not interposed for delay.

W. B. HEYBURN.

Subscribed and sworn to before me this 11th day of May, A. D. 1896.

A. L. RICHARDSON, *Clerk.*

(Endorsed:) No. 81. In the U. S. circuit court, northern division of Idaho. Royal J. Rutter and F. W. Bradley *vs.* The Shoshone Mining Company. Demurrer to amended bill. Filed May 11th, 1896. A. L. Richardson, clerk. W. P. Heyburn, solicitor for defendant.

31 In the Circuit Court of the United States in and for the District of Idaho.

ROYAL J. RUTTER and F. W. BRADLEY, Complainants,
vs.
SHOSHONE MINING COMPANY, Defendant.

John R. McBride, counsel for complainants, and W. P. Heyburn, counsel for defendant.

Opinion on Demurrer.

This action is in pursuance of section 2326, Revised Statutes, and is based upon an adverse claim by complainants, to the application of defendant for patent to mining ground.

All except two of the several causes of demurrer to the original complaint are cured by the amended complaint which complainants are permitted to file. In the remaining causes are involved the questions, (1) whether such suits arise under the laws of the United States, and (2) whether they are at law or in equity. It seemed settled by the authority of several circuit court decisions that
32 such cases are within the jurisdiction of the United States courts. In the last case upon the subject, Burke *v.* Bunker Hill M. Co., 46 Fed. Rep., 644, the question was directly raised and was fully considered and decided by Judge Sawyer.

Defendant now cites Bushnell *v.* Crook M. & S. Co., 148 U. S., 682, as holding a contrary view. While this was a suit of the nature provided for by section 2326, it was commenced and tried in the State court where the only question for decision was as to the course of a ledge. The first attempt to suggest a Federal question was by a petition in the State supreme court for rehearing, and the United States Supreme Court says this was too late to be considered, even if a Federal question were involved in the case.

It also says that the question turned largely upon the construction of a State statute, prescribing the width of mining locations. While there is some intimation only, not a declaration, that the pleader must specially plead some facts showing that a Federal question is involved, the decision seems to rest solely upon the procedure had in the State court, which was for the settling of a single fact that in no way involved the construction of any United States statute. If it does overrule the doctrine of the 46 Fed., *ante*, it does not do so with such directness as will justify this court in now departing from the prior clear holding of other courts, and by some eminent judges; therefore, that cause of demurrer is overruled.

The remaining question, as one of practice, is important,
33 and seems never to have been directly considered by the Supreme Court, but has been by a few other courts, whose decisions have been contrary. The statute (sec. 2326, *ante*) directs that when a party enters in a local land office his adverse claim to an application for patent to mining ground, he shall commence his proceeding in some court of competent jurisdiction to determine the question of "the right of possession" to the ground in dispute, and

according to the judgment of such court the rights of the parties are finally determined in the land office. By act of March 3, 1881, this section is so amended that if neither party shows title to the ground in controversy, neither will have judgment in his favor.

So far as the court is concerned, it is a special proceeding referred to its determination for the guidance of the land office, and the jurisdiction of the court in such cases is based upon prior proceedings in such land office. In questions of title and patent for agricultural and other lands, similar matters are determined by the local land office. So they might be in mineral entries had Congress so determined.

The questions for consideration are such as may, if Congress had so directed, be adjudicated without the aid of a jury.

There is nothing in the nature of the questions involved that entitles any of the parties to a jury trial, within the intent of the 7th constitutional amendment, for the whole proceeding, and every part thereof, is nothing more than a procedure established by the Government for the disposal of its lands, and certainly it cannot
34 be claimed that the purchaser can demand a trial by jury to determine his claim to Government lands.

In all such contests it must be remembered that the Government is an interested party, so far as to see that the claimants have complied with the mining requirements before they get any title to the lands. The statutes and some decisions say that this action is to determine "the right of possession" to the ground in controversy. If this were all it might be determined by ejectment, but it is submitted that this is not all, and that the use of this expression in the statute is an inadvertence or an inaccuracy, for the entire import and object of the statute is to have determined the more important question as to who, if any one, is entitled to the patent.

Frequently a party has a right to the possession and not to the patent. He is entitled to the possession as soon as he duly locates a claim, but not to a patent until he shall have done the necessary work. This action, then, is to find who is entitled to the conveyance from the Government—from the trustee—for the land in controversy. Actions for conveyance of realty are essentially equitable. Again, whatever claim either party may have to the ground in controversy is based upon an equitable title alone, while the legal title remains in the Government. Common-law actions deal with legal, and not equitable, titles. Judge Ross, in Doe *v.* Waterloo M. Co., 43 Fed., 219, held such actions equitable, for which he assigns cogent reason that need not be repeated here. Hammer *v* Garfield M. Co., 130 U. S., 291, was an action like the one under
35 consideration, and was tried in the Montana territorial court by a jury. On page 295 it is said: "As seen by this statement, the suit is brought for special relief, and the judgment entered is such as a court exercising jurisdiction in equity alone could render." And on page 296: "The court might, therefore, have heard this case and disposed of the issue without the intervention of a jury."

It is true that this particular question, so far as can be gathered

from the case, was not directly discussed. Judge Ross, however, when the case of Doe *v.* Waterloo M. Co. came before him at a time subsequent to his decision above cited, called attention to this Supreme Court case as a full justification of his ruling to which he adhered, as appears by the printed report of counsel's argument in the cause, now in my possession.

Many cases of this nature have gone to the Supreme Court, some of which were tried in the lower courts by juries and others by the courts themselves, but in none is the question directly decided. While there are a few adverse State and territorial decisions, time will not be taken to review them.

Attention had been called to an act of Congress of March 3, 1881, *ante*, in which the title refers to "suits at law," and the act itself says that "the jury shall so find etc." from which it is argued that Congress intended to declare these legal actions.

Legislators in most of the code States have by words abol-
36 ished the distinction between legal and equitable actions, but the courts all hold that such legislation does not require equitable actions to be tried by a jury. It may well be doubted that Congress, by this indirect language, intended to define the forum in which such actions should be tried, or that if the action provided for by section 2326 is equitable, that this was an attempt to change it to a legal one.

From the foregoing considerations it is concluded such actions are equitable, and the demurrer is overruled.

BEATTY.

This decision shall be held to apply also to the demurrer to the amended complaint which was also orally overruled.

Defendant is allowed 30 days after notice of this decision to plead in the cause.

B., *J.*

(Endorsed:) No. 81. In the U. S. circuit court, northern division, district of Idaho. Royal J. Rutter and F. W. Bradley *vs.* The Shoshone Mining Company. Opinion and decision on demurrer. Filed June 22d, 1896. A. L. Richardson, clerk.

37 In the Circuit Court of the United States, District of Idaho, Northern Division.

ROYAL J. RUTTER and F. W. BRADLEY }
vs.
THE SHOSHONE MINING COMPANY. }

Bill of Exceptions No. 1.

Be it known that on this 11th day of May, 1896, the defendant's demurrer to the bill of complainants having by the court been overruled, the defendant excepted to the order of the court over-

ruling said demurrer, and defendant's exceptions are duly allowed, and this bill of exceptions settled and allowed.

Done in open court this 11th day of May, 1896.

JAS. H. BEATTY, *Judge.*

And be it further known that the amended bill of complaint presented to the court to be filed on April third, 1896, was objected to by the defendant, for the reason that the court did not have jurisdiction to receive said amended bill, for the reason that the same was not presented within the time required by law; and the
38 further reason that the court did not have jurisdiction of this cause for the reasons set forth in the demurrer of defendant to said amended bill of complaint, and the objections of defendant to the filing of said amended bill of complaint, and the demurrer of defendant to said amended bill of complaint were overruled, and defendant excepted to the ruling of the court, which exception was allowed in open court, and the bill of exceptions was then and there presented and allowed by the court.

Done in open court this 11th day of May, A. D. 1896.

JAS. H. BEATTY, *Judge.*

(Endorsed:) No. 81. In the U. S. circuit court, district of Idaho, northern division. Royal J. Rutter and F. W. Bradley *vs.* The Shoshone Mining Company. Defendant's bill of exceptions No. 1. Filed May 11th, 1896. A. L. Richardson, clerk. W. B. Heyburn, counsel for defendant.

39 In the Circuit Court of the United States in and for District of Idaho, Northern Division.

ROYAL J. RUTTER and F. W. BRADLEY, Complainants,
vs.
THE SHOSHONE MINING COMPANY, a Corporation, Defendants.

Answer of Shoshone Mining Company.

The answer of the Shoshone Mining Company to the bill of complaint of Royal J. Rutter and F. W. Bradley, complainants.

This defendant now and at all times hereafter, saving to itself all and all manner of benefit or advantage of exception, or otherwise, that can or may be had or taken to the many errors, uncertainties, and imperfections in the said bill contained, for answer thereto, or so much thereof as this defendant is advised it is material or necessary for it to make answer to, answering says:

That it believes that the statements contained in the first and second paragraphs of the complainant's bill of complaint are true.

40 That this defendant, further answering, denies that the complainants, or either of them, long prior to the 20th day of August, 1895, or at any time were, or ever have been, or now are,

the owners, subject only to the paramount title of the United States, or the owners at all, or in the possession of the ground and premises claimed as that certain mine and mining claim, called the "Kirby Fraction" lode and mining claim, as described in the 3d paragraph of the plaintiffs' bill of complaint. Denies that on the 11th day of July, 1886, or at any other time, while the premises described in said complaint as the "Kirby Fraction" claim were vacant and unoccupied public mineral lands, open to exploration and location by citizens of the United States, James Day, Jacob Johns, Ed. Sullivan, and Elar Charlebois went upon the said premises and discovered therein a lode of rock in place bearing silver, lead, and other valuable metals or minerals, and located the same as a mining claim; or that the said James Day, Jacob Johns, Ed. Sullivan, and Elar Charlebois, or either of them, proceeded to or ever did erect monuments upon said alleged claim, or mark the boundaries thereof upon the surface, so that they could be readily traced; or that the said last-named persons posted a notice at the place of discovery upon said alleged claim, describing the same, or that said notice so posted was afterwards duly verified by one of said locators as required by law, or was on the 13th day of July, 1886, or at any time, filed for record in the office of the mining recorder of said mining district, or was afterwards, on the 8th day of
41 September of the same year, or at any time, recorded in the office of the recorder of said Shoshone county. That as to whether or not the said James Day, Jacob Johns, Ed. Sullivan, or Elar Charlebois, or any of them, were citizens of the United States, this defendant has not, nor can it obtain, sufficient information upon which to base a belief, and therefore denies the same.

The defendant, further answering said complaint, denies that the said notice of location, as contained on the third page of plaintiffs' bill of complaint, is a copy or a substantial copy of any notice ever posted upon the alleged "Kirby Fraction" Lode claim by the said alleged locators, or at all.

Denies that prior to the filing of said notice of location, or at any time, the said alleged locators, or any person through whom complainants claim, ever made a discovery of mineral or mineral-bearing rock in place, or a lode of mineral-bearing rock in place, upon or within the boundaries of the ground described in said notice of location as set forth in the bill of complaint.

Further answering the defendant denies that the said alleged locators or the complainants, or any person claiming in privity with them or under whom they claim, have expended in labor and improvements upon said alleged claim the sum of one hundred dollars during the years 1887, 1888, 1889, 1890, 1891, 1892, 1893, 1894, or 1895.

Further answering, the defendant says that the said alleged locators never acquired any legal right or title to the ground
42 and premises in controversy by virtue of any valid location thereof as a mining claim, or by virtue of a compliance with the mining laws of the United States and of the State of Idaho at any time. That the complainants have no right, title, or valid

claim to the right of possession of the premises in controversy by virtue of any location of a mining claim made thereon by them or their grantors or predecessors in interest, or any person or persons by, through, or from whom they claim by mesne conveyances or otherwise.

Further answering, the defendant denies that the description of the said "Kirby Fraction" Lode claim as given on the second page of the plaintiff's amended bill of complaint is entirely within the limits and boundaries fixed by the alleged original notice, and further denies that at no point does it pass beyond the said original boundaries as alleged to have been located by said "Kirby Fraction" Lode locators.

Denies that the said complainants or their predecessors in interest have done and performed all of the acts and things required by law to enable them to hold and possess the said claim according to law from the date of said location until the present time, or at all.

Denies that the boundaries of said alleged "Kirby Fraction" Lode claim, as described on the second page of the plaintiff's amended bill of complaint, are within or conform to any boundaries ever marked or claimed as the surface boundaries of the said "Kirby Fraction" Lode claim.

43 Defendant admits that it is the owner of the mining claim called the "Shoshone." Admits that on the — day of August, 1895, it caused the said "Shoshone" mining claim to be surveyed for a United States patent, but denies that it wrongfully caused the said Shoshone mining claim to be so surveyed as to crop upon or overlap the said alleged "Kirby Fraction" mining claim or include any portion thereof.

Denies that the description of the alleged conflict between said "Shoshone" mining claim and alleged "Kirby Fraction" mining claim, contained on the fourth page of the plaintiffs' amended bill of complaint, correctly describes any area of conflict between the said "Shoshone" mining claim and the said alleged "Kirby Fraction" mining claim, or that there is any such conflict existing between the said "Shoshone" mining claim and any other mining claim.

Defendant admits that on the 24th day of August, 1895, it filed the field-notes and diagram of the official survey of the Shoshone mining claim, with the application for a United States patent therefor, in conjunction with another mining claim called the "Summit," under the name of the "Shoshone and Summit Consolidated mining lodes and claims," in the United States land office at Cœur d'Alene, Idaho, and caused the register and receiver of the said land office to give notice of said application for patent by publication in the "Wardner News," a newspaper published in the vicinity as required by law.

44 Defendant admits that in said application for patent it set up and alleged that it was the owner of and in possession of the whole of said Shoshone mining claim, but denies that said allegation was wrongful. Defendant admits that it alleged that it was the owner of and in possession of all of the said Shoshone

mining claim, inclusive of the premises alleged by the complainants to be a part of the "Kirby Fraction" Lode mining claim, and asserts that said allegation was true. And defendant denies that the complainants, or either of them, or any person through whom they claim, was at the time of the filing of the defendant's said application for patent, or ever since, or at any time, has been in the possession of any portion of the ground or premises included in the defendant's said application for patent, and alleged by the complainants herein to be in controversy in this action.

Defendant denies that the complainants, or either of them, were at the time of the commencement of this suit or at any time, in the possession of the premises sued for and in controversy.

Defendant admits that the complainants, during the sixty days' period of publication of the notice of the application for patent of the Shoshone and Summit Consolidate Lode claims, did file in the said land office, under the oath of Royal J. Rutter, claiming to act in behalf of the complainants, a protest and adverse claim to said application, but denies that the said protest and adverse claim was in due form, and properly showed the nature, extent and boundaries of the adverse claim of the complainants.

Defendant, further answering, denies that the complainants
45 brought suit in support of said alleged adverse claim within thirty days after the filing of said protest and adverse claim in a court of competent jurisdiction.

Defendant denies that by reason of the prosecution of the said application for patent, that the title, or any title of the complainants in the premises described as being in conflict between the alleged "Kirby Fraction" Lode mining claim and the "Shoshone" Lode mining claim, is wrongfully imperiled, clouded, or incumbered, or that the value of the complainants' estate or property therein is greatly depreciated or depreciated at all to the damage or injury of the complainants.

Defendant admits that it gives out that the alleged location of the "Kirby Fraction" mining claim was invalid and ineffectual to appropriate said premises, and defendant alleges that such is the truth.

Defendant denies that the location of the "Kirby Fraction" mining claim was made upon the ground in the manner required by law, or duly recorded by complainants' grantors or predecessors in interest at the date long prior to the location of the "Shoshone" mining claim or at all.

Defendant denies that the complainants have no plain, speedy, or adequate remedy at law for the alleged injuries complained of in their bill of complaint.

Defendant, further answering said bill of complaint, says that if any rights or title were ever acquired to the "Kirby Fraction" Lode claim by virtue of any location, or acts of location on the part of the complainants or their predecessors in interest, such rights
46 have been forfeited before the entry of defendant by reason of the failure of the complainants and their predecessors in interest to perform the annual assessment-work and make the an-

nual expenditure upon said "Kirby Fraction" Lode claim as required by law.

Defendant, further answering, says that on the 21st day of March A. D. 1894, the ground and premises in controversy was a part of the vacant, unoccupied, and unappropriated public domain of the United States. That on said 21st day of March, 1894, W. C. Miller who was then and there a citizen of the United States, over the age of twenty-one years, entered upon the premises in controversy so being a part of the unappropriated public domain of the United States as aforesaid, and therein and thereupon made a discovery of a lode of mineral-bearing rock in place, containing silver, lead, and other valuable metals, and after making said discovery of said ledge the said W. C. Miller then and there, on the said 21st day of March 1894, proceeded to locate a mining claim covering and including said discovery of said ledge, and did then and there post a notice of location on the surface above the point of said discovery, which said notice of location contained the date of location, the name of the locator, the name of the claim, to wit, the "Shoshone" mining claim, the quantity — feet claimed along the ledge, the width claimed from the middle of the vein, and also such a description of the locality of the claim, by reference to natural landmarks and fixed objects and contiguous claims, as to render the situation of the same reasonably
47 certain from the letter of the notice itself, which said notice of location was conspicuously posted immediately over the point of discovery on the claim, and the said locator did then and there mark the said location upon the ground so that its boundaries could be readily traced, by placing a substantial post not less than 4 inches square, or in diameter, at each end of the ground claimed, and as near as practicable along the course or line of the vein or ledge, and also a similar stake or post at each corner of the location; said stakes or posts were at least four feet high above the surface, and were each marked distinctly with the name of the claim, and within fifteen days after the making of the said discovery and locating the said claim said locator did cause to be recorded in the office of the recorder of deeds, etc., in and for Shoshone county aforesaid, a substantial copy of the said location notice, so posted upon said mining claim as aforesaid. That thereafter, on the 26th day of March, 1894, the said W. C. Miller, located as aforesaid, did by deed duly made, executed, and delivered convey to the said "Shoshone" Mining Company, the defendant, the said "Shoshone" mining claim, and since the said 26th day of March, 1894, the defendant has been and now is the owner of all and singular the premises, the "Shoshone" mining claim aforesaid.

That during the year 1894 the defendant expended in labor and improvements upon said "Shoshone" mining claim more than one hundred dollars, and during the year 1895 the defendant expended in labor and improvements upon said Shoshone mining
48 claim more than one thousand dollars, and during the year 1896 the defendant has expended in labor and improvements upon said Shoshone mining claim more than one thousand dollars.

That the defendant has been since the said 26th day of March, 1894, and now is, in the continuous and exclusive possession of the said "Shoshone" mining claim and of the ground in controversy, holding and claiming the same under and by virtue of the location of said mining claim so made as aforesaid, and is entitled to hold, own, and possess the same, and to receive a United States patent therefor under the application aforesaid.

We submit to the judgment of this honorable court, and humbly insist that this suit is altogether unnecessary and vexatious, and that even if the plaintiffs had been entitled to such relief as is prayed by the said bill, the said relief might have been obtained by proceedings at law, and we claim the same benefit from this our answer as if we had demurred to the said bill.

And this defendant denies all and all manner of unlawful combination and confederacy wherewith he is by the said bill charged, without this, that there is any other matter, cause, or thing in the said plaintiffs' said bill of complaint contained, material, or necessary for this defendant to make answer unto, and not herein or hereby well and sufficiently answered, confessed, traversed, and avoided or denied, is true to the knowledge or belief of this defendant; all of which matters and things this defendant is ready
49 and willing to aver, and humbly prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

Wherefore, the defendant further prays the judgment of this court that the plaintiffs are not entitled to the possession of the ground in controversy, and that the defendant is the owner of and entitled to the possession of all of the ground in controversy, and is entitled to receive a patent of the United States therefor, as applied for.

[SEAL.] THE SHOSHONE MINING COMPANY,
By W. B. HEYBURN, *Vice-President.*

Attest: W. B. SAMS, *Secretary.*

UNITED STATES OF AMERICA, } ss:
Eastern District of Washington, }

W. B. Heyburn makes solemn oath and says: I am the vice-president of the defendant above named. So much of the foregoing answer as concerns the acts and deeds of the defendant is true to the best of my knowledge, and so much thereof as concerns the acts and deeds of any other person or persons I believe it to be true.

W. B. HEYBURN.

Subscribed and sworn to before me this sixth day of July, A. D. 1896.

[SEAL.] E. M. HEYBURN,
Notary Public.

50 (Endorsed:) No. 81. In the United States circuit court, ninth judicial circuit, in and for the district of Idaho, northern division. Royal J. Rutter *et al. vs.* The Shoshone Min. Co. Answer (original). Filed July 8th, 1896. A. L. Richardson, clerk. W. B. Heyburn, of counsel for the defendant.

In the Circuit Court of the United States in and for the District of Idaho, Northern Division.

ROYAL J. RUTTER and F. W. BRADLEY, Complainants,
vs.
THE SHOSHONE MINING COMPANY, a Corporation, Defendants.

Replication to Answer.

Replication to the answer of defendant, Shoshone Mining Co., by Royal J. Rutter and F. W. Bradley, complainants.

Now come the complainants, Royal J. Rutter and F. W. Bradley, and reserving unto themselves all and all manner of advan-
51 tage of exception to the manifold insufficiencies of the answer of said Shoshone Mining Company, for replication thereunto say: That they will aver and prove their said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by these replicants, without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, confessed, and avoided, traversed, or denied is true, all which matters and things these replicants are and will be ready to aver and prove as the honorable court shall direct, and humbly pray as in and by their said bill of complaint they hath already prayed.

(Signed) JNO. R. McBRIDE,
Solicitor for Complainants.

JNO. R. McBRIDE, *Counsel.*

(Endorsed:) No. 81. Circuit court of United States, district of Idaho, northern division. Royal J. Rutter and F. W. Bradley, complainants, *vs.* Shoshone Mining Company, defendant. Replication. Filed Aug. 6th, 1896. A. L. Richardson, clerk. Jno. R. McBride, solicitor for complainants.

52 *Bill in Equity as Amended by Leave of Court.*

In the Circuit Court of the United States in and for the Northern Division of the District of Idaho.

ROYAL J. RUTTER and F. W. BRADLEY, Complainants,
vs.
THE SHOSHONE MINING COMPANY, a Corporation, Defendant.

Second amended bill of complaint.

To the judges of the circuit court of the United States for the northern division of the district of Idaho:

Come now your orators, Royal J. Rutter and F. W. Bradley, citizens and residents of the State of Idaho and of the northern division of the district of Idaho, and bring this bill against the Shoshone

Mining Company, a corporation doing business in said district as such, and thereupon your orators complain and allege:

That your orators are each citizens of the United States and the State of Idaho and residents of the county of Shoshone, State of Idaho, and that the Shoshone Mining Company is a corpora-
53 tion, organized and existing under the laws of the State of Idaho, and a citizen thereof, engaged in business as a mining corporation, and having agents in charge thereof at Wardner, in the said county of Shoshone, State and District of Idaho.

Your orators further allege that long prior to the twentieth day of August, 1895, your orators were, ever since have been, and now are the owners (subject only to the paramount title of the United States) and in the possession of that certain mine and mining claim containing a lode of rock in place, bearing silver, lead and other valuable minerals and metals, situate in Yreka mining district, Shoshone county, State of Idaho, called the Kirby Fraction lode and mining claim, and more particularly described as follows: Commencing at a post called post No. 1 of said claim, firmly planted in the earth; thence running north 79 degrees, 28 minutes west to a point called post No. 2 of said claim, a distance of 827.2 feet; thence south 16 degrees, 13 minutes west, 539.3 feet to post No. 3 of said claim; thence north 84 degrees, 27 minutes east, 918.5 feet to post No. 4, from which point the quarter-section corner between sections 12 and 13 of township 48, north, range 2, E. B. M., United States surveys, bears south 51 degrees, 58 minutes east, 606.8 feet distant; thence from said post No. 4 on a course north 16 degrees, 13 minutes east, 283.6 feet to corner post No. 1, and place of beginning, and comprising an area of 8,057 acres. That on the 11th day of
54 July, 1886, whilst the premises above described were vacant, unoccupied, public mineral lands, open to explorations and location by citizens of the United States, James Day, Jacob Johns, Ed. Sullivan, Elar Charlebois, each being a citizen of the United States, above the age of twenty-one years, went upon said premises and discovered therein a lode or rock in place, bearing silver, lead, and other valuable metals and minerals, and located the same as a mining claim. That they proceeded to erect monuments upon said claim, and marked the boundaries thereof upon the surface so that they could be readily traced. That at the place of discovery of the minerals upon said claim they posted a notice describing the same, which notice was afterward duly verified by one of the said locators as required by law, and on the 13th day of July, 1886, filed for record in the office of the mining recorder of said mining district and afterward, on the eighth day of September of the same year, recorded in the office of the recorder of said Shoshone county, which record of the location, with the affidavit and the certificate of said recorder of the mining district and the county of Shoshone, are as follows:

Notice of Location of Quartz Claim.

Notice is hereby given to all whom it may concern that James Day, Jacob Johns, Ed. Sullivan, and Elar Charlebois, citizens of the United States, over the age of twenty-one years, having dis-
55 covered a vein or lode of quartz or rock in place, bearing mineral within the limits of the claim hereby located, have this day, under and in accordance with the Revised Statutes of the United States, chapter six, title thirty-two, located 1,400 feet (fourteen hundred feet), linear feet of this vein or lode, with surface ground 400 feet (four hundred feet) in width, situated in the Yreka mining district, county of Shoshone, and known as the Kirby Fraction quartz mining claim, and extending 1,250 feet (twelve hundred and fifty) westward direction and one hundred and fifty (150) in an easterly direction, and two hundred on each side from this notice at the discovery or prospect shaft, which is one hundred and fifty feet from the east end line, the exterior boundaries of this claim being distinctly marked by reference to some natural objects or permanent monuments, and more particularly described as follows, to wit: Starting at this notice and running 150 feet westerly to post marked east center end; thence northerly 200 feet to post marked northeast corner; thence westerly 1,400 feet to post marked northwest corner; thence southerly 200 feet to post marked west center end; thence southerly 200 feet to post marked southwest corner; thence 1,400 feet easterly to post marked northeast corner; thence northerly 200 feet to post marked east center end or place of beginning; one-half mile west of Wardner, and on the west slope of Milo creek, bounded on the north by the Last Chance lode, and on the east by what is known as the Emma lode.

56 Located this 11th day of July, 1886.

JAMES DAY,
ED. SULLIVAN,
JACOB JOHNS,
ELAR CHARLEBOIS, *Locators.*

TERRITORY OF IDAHO, } ss:
County of Shoshone, }

I, Jacob Johns, do solemnly swear that I am acquainted with the mining ground described in the notice of location herewith called the Kirby Fraction ledge, lode, or claim, and that the ground and claim therein described, or any part thereof, has not, to the best of my knowledge and belief, been heretofore located according to the laws of the United States and of this Territory, or if so located that the same has been abandoned by reason of the failure of such former locators to comply in respect thereto with the requirements of said laws.

JACOB JOHNS.

Subscribed and sworn to before me this 13th day of July, 7.30 p. m., 1886.

L. F. ROBERTSON,
Deputy Recorder.

57 Filed for record this 13th day of July, 1886, at 7.30 p. m., at the request of Jacob Johns, recorded in Book "B" of Quartz Locations, Yreka District, page 229.

L. F. ROBERTSON,
Deputy Recorder.

Recorded at the request of L. F. Robertson, Sept. 8th, 1886, at 5 p. m.

THOS. E. McLELLAND,
County Recorder,
By M. J. SWEENY, *Deputy.*

That thenceforward and thereafter the said locators and their grantees have each and every year performed the work and labor upon said premises of the amount of more than $100.00, and by certain mesne conveyances from said locators to complainants they have succeeded to all the rights of said original locators. That the description of said Kirby Fraction lode as first above given herein is entirely within the limits and boundaries fixed by said original location and notice, and at no point passes beyond the said original boundaries as located by said Kirby Fraction Lode locators, and the said complainants herein and their predecessors in interest have done and performed all the acts and things required by law to enable them to hold and possess the said claim according to law from the date of said location until the present time.

That the defendant, claiming to be the owner of an alleged adjacent mining claim called the "Shoshone mining claim," on
58 or about the — day of August, 1895, wrongfully caused the said Shoshone mining claim to be so surveyed as to crop upon and overlap the said Kirby Fraction Lode mining claim and to include a portion thereof, described as follows: Commencing at a point 457.58 feet from corner No. 1 of said Kirby Fraction mining claim, as described on the easterly line thereof; thence running north 79 degrees, 28 minutes west, 399.45 feet to post No. 2 of said Kirby Fraction mining lode claim; thence south 16 degrees, 13 minutes west, 447.56 feet to a point; thence south 51 degrees, 56 minutes east, 105.1 feet to a point; thence north 82 degrees, 55 minutes, east, 376.9 feet to a point; thence north 41 degrees east, 355.9 feet to a point; thence north 58 degrees, 19 minutes west, 202.76 feet to the point of commencement, and containing 5.16 acres, the boundaries whereof are particularly indicated by the red lines on the diagram hereto annexed and marked Exhibit "A," and made part of this bill.

That on or about the 24th day of August, 1895, the said defendant filed the field-notes and a diagram of this survey of the alleged Shoshone mining claim, and also an application for a United States patent for said mining claim, in conjunction with one other alleged mining claim called by it the "Summit," under the name of the Shoshone Consolidated quartz mining lodes and claims, in the United States land office, at Cœur d'Alene city, Idaho, and caused

the register and receiver of said land office to give notice of
59 said application for patent by publication in the "Wardner News," a newspaper published in the vicinity as required by law.

That in and by said application for patent the defendant set up and wrongfully alleged that it was the owner and in possession of the whole of said Shoshone mining claim, inclusive of the premises last above described and of the lode therein, part of the Kirby Fraction lode and mining claim, and the property and in the possession of the complainants. That your orators, during the sixty days' period of publication of the notice of application for patent for said alleged Shoshone and Summit Consolidated lodes and mining claims, filed in said land office, under the oath of the said Royal J. Rutter, acting in behalf of your orators, a protest and adverse claim to said application and for said last-described premises and the lode therein, in due form, showing the nature, extent, and boundaries of the adverse claim of your orators, and thereupon proceedings on said application in said land office were and are stayed to await the determination by a court of competent jurisdiction of the right of possession of said last-described premises and the rights of the respective parties therein and thereto, and to that end the complainants bring this suit, and the period of thirty days not having elapsed since the filing of said protest and adverse claim.

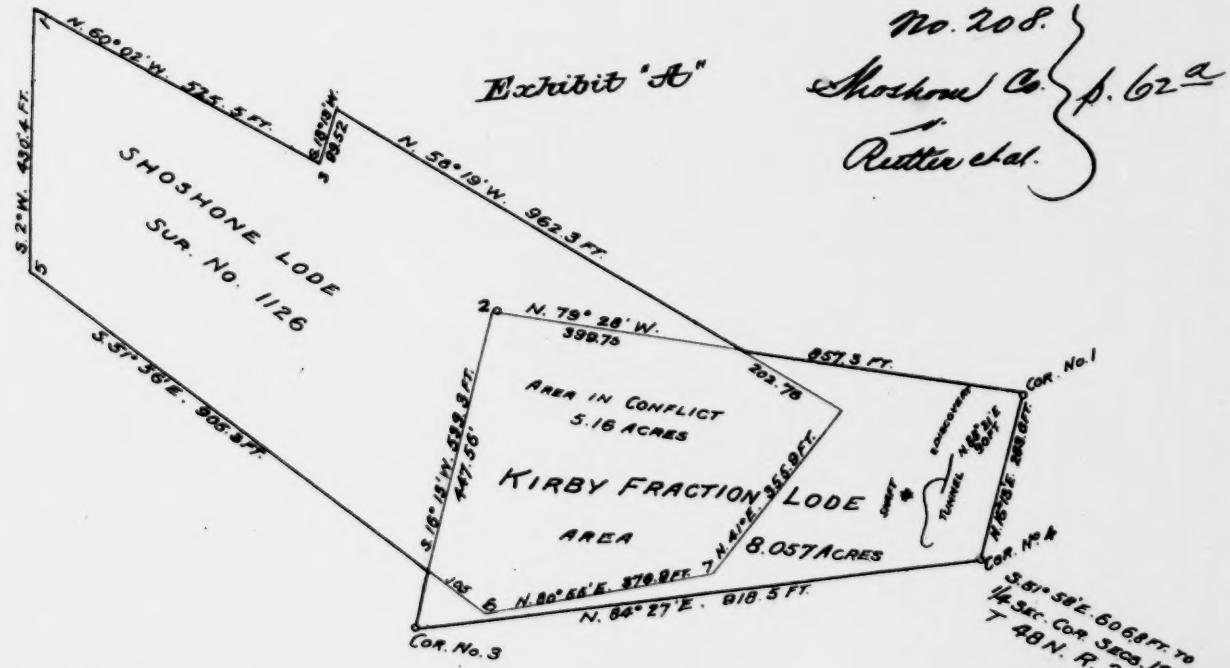
That the defendant maintains and prosecutes said application for patent to the premises in conflict and to the said Shoshone
60 mining claim, and thereby the title and possession of your orators in and to the premises described, being the area thus brought into conflict between the Kirby Fraction Lode mining claim and the alleged Shoshone mining claim, are wrongfully imperiled, clouded, and incumbered, and the value of your complainants' estate and property therein is greatly depreciated to their great damage and injury, and that the ground in conflict is of the value of more than $10,000, exclusive of interest and costs.

That the said defendant pretends and gives out that the location of said Kirby Fraction mining claim, though made upon the ground in the manner required by law, and duly recorded by the complainants' grantors and successors in interest, and at a date long prior to the pretended location of the Shoshone mining claim, was invalid and ineffectual to appropriate said premises, and that the pretended location of the Shoshone mining claim was made upon unoccupied public mineral land at its alleged date, all of which pretensions are false and untrue, and that for these injuries there is no plain, speedy, or adequate remedy at law.

Wherefore your orators pray:

First. That the said defendant may be compelled to answer all and singular the premises in this bill, but not under oath (answer under oath being hereby expressly waived), and that relief be ordered and decreed to your orators as follows:

61 That the complainants are the owners of and entitled to the premises in conflict as described herein, and of the lode therein, and granting and confirming the complainants' title thereto


No. 208.
Shoshone Co.
Ruttler Sal.
p. 62a
Exhibit "A"
N. 60° 02' W. 525.5 FT.
S. 2° W. 430.4 FT.
S. 57° 38' E. 305.3 FT.
N. 56° 19' W. 962.3 FT.
S. 18° 19' W. 23.52
SHOSHONE LODE
SUR. NO. 1126
N. 79° 28' W. 399.75
203.76
857.3 FT.
AREA IN CONFLICT
5.16 ACRES
KIRBY FRACTION LODE
AREA
8.057 ACRES
S. 18° 19' W. 532.9 FT.
447.56'
N. 41° E. 356.9 FT.
N. 80° 55' E. 370.9 FT.
N. 84° 27' E. 818.5 FT.
DISCOVERY
SHAFT
TUNNEL N. 65° E. 305 FT.
N. 15° E. 268 FT.
COR. No. 1
COR. No. 2
COR. No. 3
S. 51° 58' E. 606.8 FT. TO 1/4 SEC. COR. SECS. 12 & 13 T. 48 N. R. 2 E.

nd possession thereof; that the defendant, The Shoshone Mining Company, has no title to or right of possession of said conflict and f the lode therein, or of any part thereof.

That the defendant be restrained and enjoined, pending this action, nd upon trial perpetually, from entering in or on said conflict, or he lode therein, or any part thereof, or mining in or extracting any re bodies or minerals therefrom, and from in any way interfering ith the possession thereof; and for such other and further relief as ay be consistent with the equity of the case; and your orators rther pray that your honors will grant to your orators the writ of ubpœna issuing out of and under the seal of this court to the said hoshone Mining Company, commanding it by a certain day to appear before your honors in the court aforesaid, and there and then nswer these premises and abide the further order and direction of his court.

JNO. R. McBRIDE,
Complainants' Solicitor.

JNO. R. McBRIDE, *Of Counsel.*

82 STATE OF IDAHO, } ss:
County of —, }

F. W. Bradley, being first duly sworn according to law, deposes nd says that he is one of the complainants in the above-entitled ction, and has read the foregoing bill of complaint, knows the conents thereof, and that the same are true of his own knowledge, except uch matters and things as are stated upon information or belief, nd as to those things he believes them to be true.

F. W. BRADLEY.

Subscribed and sworn to before me this 21st day of May, 1897.
A. L. RICHARDSON, *Clerk.*

(Endorsed:) No. 81. In the U. S. circuit court, northern division, listrict of Idaho. Royal J. Rutter and F. W. Bradley *vs.* The Shoshone Mining Co. Second amended bill of complaint. Filed May 21st, 1897. A. L. Richardson, clerk.

(Here follows diagram marked p. 62*a*.)

83 In the Circuit Court of the United States in the Northern Division of the District of Idaho.

ROYAL J. RUTTER and F. W. BRADLEY, Complainants,
vs.
THE SHOSHONE MINING COMPANY, a Corporation, Defendant.

John R. McBride and Chas. W. Beale, attorneys for complainants.
W. B. Heyburn, attorney for defendant.

Opinion.

The defendant company claims to have discovered a vein by underground workings, and thereupon located and defined upon the

surface the Shoshone mining claim, for which it applied for patent, and in such application included a part of the surface of the "Kirby" claim, owned by plaintiffs, who thereupon commenced this their "adverse action" to determine the ownership of the ground in conflict.

64 Among the many propositions which were discussed during the trial and presentation of the cause those now considered will be referred to in connection with the facts applicable to each. The relation to each other of the claims having any bearing upon the result of this action appears by the following plat:

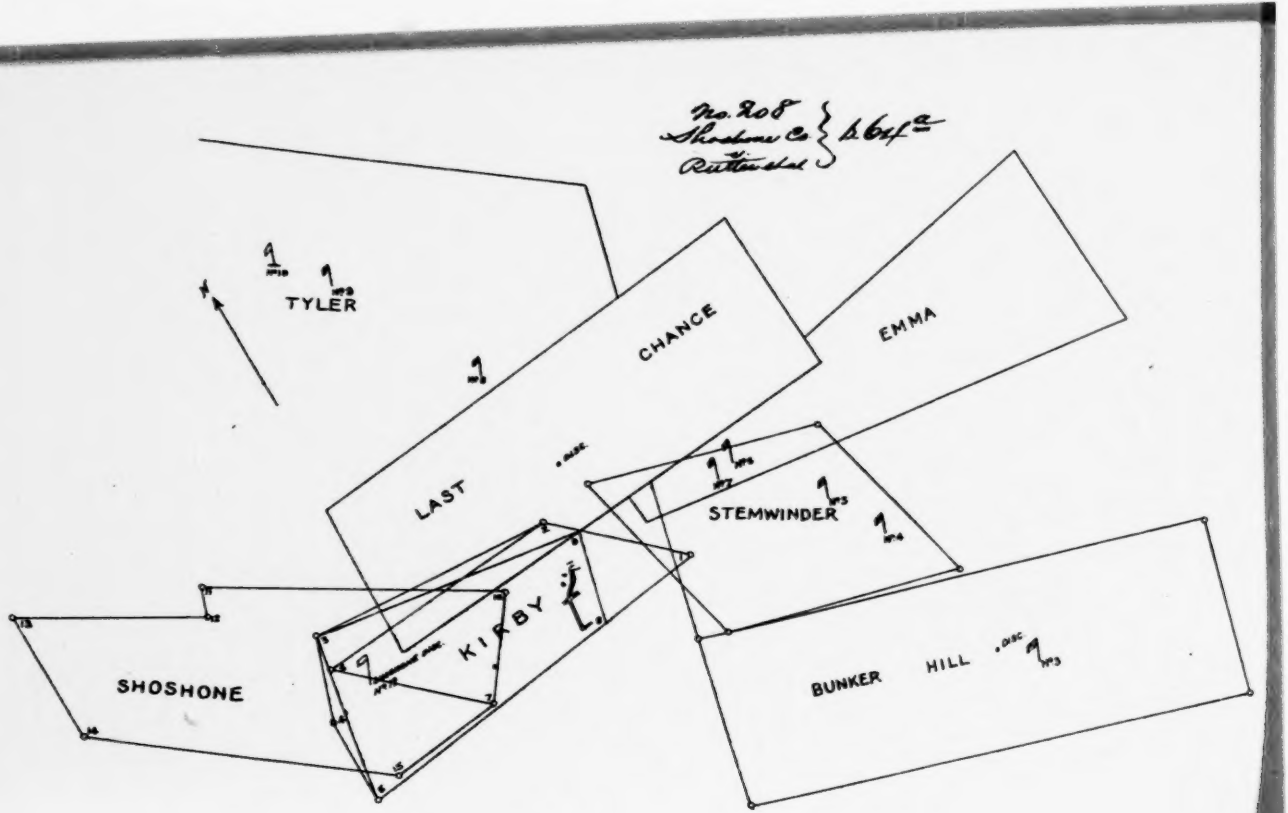
(Here follows diagram marked p. 64*a*.)

Is the place of the posting the notice of an underground discovery important?

It seems in this case to have been so regarded, and the locator of the "Shoshone" attempted to post his notice upon the surface marked on the plat "Shoshone disc.," perpendicularly over the place of the underground discovery. The "Kirby," as originally located, is indicated by the lines 1, 2, 3, 4, and 5. Some time after its location it was bonded to certain parties, and an official survey for patent was made of it in the form indicated by the lines 1, 2, 6, and 7, which did not include the place where the "Shoshone" notice was posted, but as now surveyed and indicated by the lines 3, 5, 8, and 9 such place is included. The defendant company insists that the "Shoshone" notice was posted in view of such first survey, and so that it might not be within the limits of any other claim, and that the "Kirby" should be bound by such first survey. There can be no doubt that if the owners of the "Kirby" authorized such survey, they could not subsequently so change it as to interfere with intervening attaching rights. It is, however, claimed by the "Kirby" owners that such first survey was unauthorized by

65 them, and was procured alone upon the motion of the party to whom they had bonded the claim.

As I view the law these questions are not material. In the first place, it is questionable what surface rights accrue to the discoverer of a ledge under the tunnel-site law, that statute—section 2323—only grants: "Where a tunnel is run for the development of a vein or lode, or for the discovery of mines, * * * the rights of possession of all veins * * * not previously known to exist, discovered in such tunnel to the same extent as if discovered from the surface." This gives a right only to the vein discovered not previously known to exist. It grants no surface rights nor other vein than that discovered, but to this, the same rights in extent, as if discovered from the surface. I think the only reference in the law to surface rights is that in section 2322, which treats alone of locations made of ledges discovered upon the surface, whereby certain surface is granted, together with every ledge whose apex is within such surface. To apply all the rights granted by this section to a discovery under section 2323 would be a most liberal construction. It would be granting to the locator all ledges apexing within the


No. 208
Shoshone Co
Patented
6.64 ac
TYLER
CHANCE
EMMA
LAST
STEMWINDER
KIRBY
SHOSHONE
BUNKER HILL

surface location he might make, even when the apex of the ledge he actually discovered far underground might be without the boundaries of the surface located.

Whatever should be the construction of the law, it has made no direct provision for surface rights for ledges discovered under the tunnel-site law, yet it is reasonable to presume that necessary
66 surface rights are implied. But should they not be where they can be of utility? The original idea of surface rights was only for the purpose of working the vein and only the vein discovered. Surface rights on the top of a hill of a vein discovered far underground can be of no practical value to such vein.

Again: The law makes no provision for the posting of any notice of a ledge discovered under section 2323, but it may be fairly presumed that some notice to the world, aside from the tunnel-site location notice, should be made, that it may be known where in the tunnel the ledge is situated, and in what direction, and how far from the place of discovery it is claimed; but these purposes are more fully answered by placing such notice at the mouth of the tunnel where prospectors are more likely to go to ascertain what rights are claimed through the tunnel, and where surface rights could be made useful. Certainly it serves no useful purpose to place such notice perpendicularly over the discovery, for there is not the least probability that this is on or over the apex which is most likely, in cases of a deep discovery, to be beyond the boundaries of the surface so located, and a notice so posted is likely rather to mislead than direct another prospector, who may find the apex beyond such surface limits.

Certainly, under the congressional mining act the place of posting the notice of even a location based upon a surface discovery is not important. The apex of the ledge must be within the surface claimed, while, independent of local laws, the notice might be elsewhere, if sufficiently near and sufficiently definite in its de-
67 scription to define the discovery and the claim. The place of the ledge discovery, and not that of the posting of the notice, is the more important question. This was in effect long since held in the case of Phillpots *v.* Blasdel, 8 Nev. But whatever the law may be, modified as it is by local laws, as to the place of posting the notice of a surface discovery, I think the notice of a discovery made far underground may be posted at any point upon the surface which is likely to give notice of the location of the ledge discovered, and that it is immaterial whether the place of posting is within the limits of another claim or not. It does not appear from the pleadings that the "Shoshone" claim was located in pursuance of section 2323, but it does appear that the alleged discovery is far underground, and that the notice was posted immediately over the place not to mark where the apex of the ledge is, but where underground the discovery was made, and I hold that as to the posting of the "Shoshone" notice it is valid, even if within the limits of another valid claim.

Can a location be so based upon the alleged discovery of a ledge in its subterranean depths, which has been previously discovered and located upon the surface, is an important question affecting the validity of the "Shoshone" claim.

It is admitted that the ledge upon which the "Shoshone" is located is the same which apexes in prior locations, to wit, the
68 Bunker Hill, Stemwinder, Emma, Last Chance, and Tyler, and that the apex of the ledge runs through these claims as indicated by the line of flags, numbered 3 to 10, inclusive, upon the plat. There can be no doubt that the entire apex of that part of this ledge upon which the "Shoshone" is located is covered by these several claims, yet it so happens, either under the absurdities of the mining law or its erroneous interpretation, that while the entire apex of a ledge may be covered by several claims, they may not altogether hold all portions of the ledge in its underground depths. If it were clear by the evidence in this case that the several claims, which have the apex of the ledge, can follow it in its depths under the "Shoshone," it would be equally clear that the "Shoshone" would be invalid, but it is argued that some of these claims have no extralateral rights. It is settled that when a claim is so located that the apex crosses the side lines they become end lines, between whose planes the ledge can be followed, but it is also argued here that when those planes are more along the course of than across the ledge, that the ledge cannot be followed beyond the boundaries of the claim. It is true, as suggested by counsel, that this court once instructed a jury (but with much doubt) that a ledge could not be followed more on its course than on its dip, and it does seem absurd, when the law says ledges may be followed on their "depths," for the courts instead to say they may be followed along their "course." But the court of appeals did not by word affirm this instruction of this court, nor has that rule been supported by any court save a *nisi prius* court in Utah Territory. It would
69 seem that the only logical conclusion of the holdings of the courts that ledges must be followed between the planes of the lines they cross is that they may be followed indefinitely between those planes prolonged; for to say that when such following would be more along the course than on the dip you must stop at the side boundary line of the claim, is making a new law which Congress never authorized. If there is any one right specially granted by Congress it is to follow the ledge indefinitely on its depths, which the miner has always claimed and done, only he followed it on its dip, which, to some extent, the courts have unfortunately felt constrained, under their views of the law, to modify.

While I am inclined to think that the Stemwinder and the other claims named have such extralateral rights as will include this vein under the "Shoshone," I do not think that question can be determined in this case without further testimony, but it may be said that if there is any portion of the ledge within the "Shoshone" which is not covered by their extralateral rights, it will belong to the "Shoshone," if this latter claim is not void as against the "Kirby."

Is the "Kirby" a valid location?

It is said that it is void because relocated before the "Edith" location—which was substantially the same ground—had become forfeited or abandoned. Of course it is clear that ground once located cannot be relocated by other parties until forfeiture or abandonment of the first location. Citations on this question are unnecessary.

70 It has been said that the locators of the "Edith" did not intend to abandon it before locating the "Kirby." The fact is they did not intend to abandon the ground, but only the name. The same parties who located the "Edith" concluded to add to their ground as first located, and did so by changing their lines, and locating as the "Kirby." I cannot doubt the right of locators to change their lines as well as the names of their claims as often as they desire, so long as they do not interfere with other rights. Any change in the name of the claim or its boundaries by the owners thereof, certainly, is good from the day when the change is made, if no other rights have intervened and the location or relocation, if it may be so termed, of this ground as the "Kirby" is good from the day of such location.

That subsequently, deeds were made by the parties of the "Edith" does not prove that they considered that both the "Edith" and "Kirby" were in existence, but this only shows that some overcautious attorney perhaps, or whoever may have so advised, had an unnecessary thing done, as a matter of precaution. It is not the name, but the ground, that is conveyed. The name only designates or identifies the ground; it may be conveyed by metes and bounds as effectively as by name, and a conveyance by any name conveys the ground, though it may be known by many names.

Has the "Kirby" a ledge?

71 Were it required that the evidence should remove all reasonable doubt, I should answer this question in the negative, but under the liberal rule that prevails as to the constitution of a ledge within the law, I think the preponderance of evidence is in favor of such a discovery. It does, however, sometimes appear that the rule that a ledge within the law is that "which the miner would follow with the hope of finding ore" is often carried so far as to lead to a perversion of the intent of the law. It results that almost any kind of a crevice filled with matter differing from the general country rock is held a sufficient ledge upon which to base a location, and, as a result, all mining countries are plastered over with locations as worthless as the lava beds of this great interior basin.

Just when this discovery was made I have not taken time to determine from the testimony, except that it was before the location of the "Shoshone," which, under the weight of authority, is considered sufficient. While I personally feel that any location of a mining claim made before the discovery of a vein or lode within its limits should be held void *ab initio*, such opinion must yield to

what is deemed the preponderance of authority. Certainly, it is not claimed here that the location of a claim without the discovery of a ledge is valid prior to such discovery, or is valid against another valid location made.

It seems altogether probable that whatever ledge the plaintiffs have is but a spur or a part of the main ledge passing through the other claims named, the apex wherein is indicated as above stated, but until it descends and becomes a part of such ledge the plaintiffs are entitled to it.

72 It has also been suggested that thus far the plaintiffs' ledge has not been proven a valuable one—that is not necessary. If it is sufficient in the beginning to justify a location, which I have reluctantly held, it is sufficient for all time, even if it never becomes valuable.

The whole case considered, it must be held that the "Kirby" is a valid location and prior to the "Shoshone," and that the plaintiffs are entitled to judgment therefor against the defendant for a patent to the ground in dispute between the parties and to their costs, and it is ordered accordingly.

BEATTY, *Judge.*

(Endorsed:) No. 81. In the U. S. circuit court, northern division, district of Idaho. Royal J. Rutter and F. W. Bradley *vs.* The Shoshone Mining Company. Decision. Filed June 25th, 1897. A. L. Richardson, clerk.

73 Circuit Court of the United States, District of Idaho, Northern Division, May Term, 1897.

ROYAL J. RUTTER and F. W. BRADLEY, Complainants,
vs.
THE SHOSHONE MINING COMPANY, Defendant.

Suit on adverse claim on application for patent to mineral land by defendant.

Decree.

This cause came on for hearing at this May term of court, and the proofs having been taken and heard by the court and the cause argued by the counsel for the respective parties, was submitted, and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows:

That Royal J. Rutter and Frederick W. Bradley, complainants herein, are the lawful owners and in the lawful possession,

74 and entitled to the right of possession, of that certain piece or parcel of mining ground and premises situated and being in Yreka mining district, county of Shoshone, State of Idaho, known as and called the Kirby Fraction Lode mining claim, more particularly described as follows:

Commencing at a post called post No. 1 of said claim; thence

running north 79 degrees 28 minutes west to a point called post No. 2 of said claim, a distance of 827.2 feet; thence south 16 degrees 13 minutes west, 539 feet to post No. 3 of said claim; thence north 84 degrees 27 minutes east, 918.5 feet to post No. 4 of said claim; from which point the quarter-section corner between sections 12 and 13 of township 48 north, of range 2 east, B. M., United States surveys, bears south 51 degrees 58 minutes east, 606.8 feet distant; thence from said post No. 4, on a course 16 degrees 13 minutes east, 283.6 feet to corner post No. 1 and place of beginning, and comprising an area of 8.057 acres. That said complainants have, by virtue of compliance with the laws of the United States and the local laws and mining regulations of the State of Idaho and Yreka mining district, in reference to the sale and disposal of the public mineral lands, become the owners of, and of the right of possession of, said premises, and of every part and parcel thereof. That the claim of the defendant, The Shoshone Mining Company, to the premises, or any part thereof, is without right or foundation of any kind, and that its application for patent thereto from the United States, or any part thereof, is without any just right or claim thereto, and the same is hereby denied.

75 It is further ordered, adjudged, and decreed that the right of possession and title of said Royal J. Rutter and Frederick W. Bradley is hereby declared to be, and it is hereby decreed, free and clear of all claim or pretense of right or title asserted or claimed by said defendant, and is hereby forever quieted in said complainants.

It is further ordered, adjudged, and decreed that the said defendant, The Shoshone Mining Company, be, and it is, and all of its agents, workmen, servants, employees, and any and all other persons and corporations acting under its permission or authority, and each of them is, hereby enjoined perpetually from entering into or upon said Kirby Lode mining claim, or working therein or thereon, or extracting any ores or mineral therefrom, or committing any trespass or waste therein.

And it is further ordered, adjudged, and decreed that the said complainants do have and recover of and from the said Shoshone Mining Company, defendant, their costs, taxed at $322.18, and that the complainant have execution therefor.

JAMES H. BEATTY, *Judge.*

(Endorsed:) No. 81. In the U. S. circuit court, northern division, district of Idaho. Royal J. Rutter and F. W. Bradley *vs.* The Shoshone Mining Company. Decree. Filed Aug. 30th, 1897. A. L. Richardson, clerk.

76 In the United States Circuit Court in and for the Northern Division, District of Idaho.

ROYAL J. RUTTER and F. W. BRADLEY, Complainants,
vs.
THE SHOSHONE MINING COMPANY, a Corporation, Defendant.

Stipulation to Settle Bill of Exceptions.

It is hereby stipulated, as in open court, by and between the parties hereto that either party may have until July 15th, 1897, to prepare and present for settlement bill of exceptions upon any and all points of exception taken at the trial of the above-entitled action.

JNO. R. McBRIDE,
Solicitor for Defendant.
W. B. HEYBURN,
Solicitor for Plaintiffs.

(Endorsed:) No. 81. In the U. S. circuit court, northern division, district of Idaho. Royal J. Rutter *et al. vs.* Shoshone Mining Company. Stipulation. Filed July 5th, 1897. A. L. Richardson, clerk.

77 In the Circuit Court of the United States in and for the District of Idaho, Northern Division.

ROYAL J. RUTTER and F. W. BRADLEY, Complainants,
vs.
THE SHOSHONE MINING COMPANY, a Corporation, Defendant.

THE SHOSHONE MINING COMPANY
vs.
ROYAL J. RUTTER and F. W. BRADLEY, Defendants.

Stipulation to Hear Cases Together.

It is hereby stipulated and agreed by and between the counsel for plaintiffs and defendants in the two above-entitled causes that from this time forward, in all proceedings, whether in the
78 above-entitled court or in any appellate court, the said two cases shall be heard together. That the record in the case of The Shoshone Mining Company *v.* Rutter and Bradley, wherein the testimony and proceedings taken and had in the case of Rutter and Bradley *v.* The Shoshone Mining Company are referred to, need not reprint or duplicate such testimony or proceedings. That where the testimony taken in the case of The Shoshone Mining Company *v.* Rutter and Bradley refers to or adopts the testimony or proof taken in the case of Rutter and Bradley *v.* The Shoshone Mining Company, such reference or adoption shall be a sufficient incorpora-

tion in the record, without reproducing the same, and the said two cases may be hereafter considered together for all purposes.

JNO. R. McBRIDE,
Solicitor for Rutter and Bradley.
W. B. HEYBURN,
Solicitor for the Shoshone Mining Company.

(Endorsed:) No. 81. In the United States circuit court, ninth judicial circuit, in and for the district of Idaho, northern division. Royal J. Rutter *et al. vs.* The Shoshone Mining Company. Stipulation to hear cases together. Service admitted this July 12th, 1897. Jno. R. McBride, solicitor for complainants. W. B. Heyburn, counsel for Shoshone Mining Co. Filed July 14, 1897. A. L. Richardson, clerk.

79 In the Circuit Court of the United States in and for the District of Idaho, Northern Division.

ROYAL J. RUTTER and F. W. BRADLEY, Complainants,
vs.
THE SHOSHONE MINING COMPANY, a Corporation, Defendant.

Motion for Rehearing.

The defendant in the above-entitled cause now moves the court for a rehearing therein on the following grounds:

I.

That the evidence shows that there was no discovery made upon the "Kirby" location prior to the making of said location, and that it is essential that this should appear affirmatively in the findings of the court in the record.

II.

80 That the testimony shows that the southwest corner stake of the "Kirby" was drawn in officially, and that from the time of the drawing in of said corner stake the "Kirby" owners made no claim to the ground lying beyond that boundary so established, which facts should appear affirmatively in the findings of the court and in the record.

III.

Because the testimony shows that the "Edith" location was perfected prior to the location of the "Kirby," and covered the same ground, which facts should appear distinctly in the findings of the court and in the record.

IV.

Because the record shows that the defendant's claim was based upon a discovery of mineral-bearing rock in place, deep under the surface, which facts should distinctly appear in the findings of fact by the court and in the record.

V.

Because the testimony shows that the Shoshone mining claim was located upon vacant and unoccupied public mineral land of the United States.

VI.

Because the testimony shows that the ledge as claimed by the Shoshone Mining Company does not belong to any other person, and is the property of the Shoshone Mining Company.

81 VII.

Because the testimony shows that the Shoshone Mining Company is entitled to a patent for the ground in controversy.

VIII.

That any judgment or decree or findings made by the court in the premises should be accompanied by the testimony or a statement of the testimony adduced before the court at the trial.

W. B. HEYBURN,
Counsel for Defendant.

(Endorsed:) No. 81. In the United States circuit court, ninth judicial circuit, in and for the district of Idaho, northern division. Rutter and Bradley *vs.* The Shoshone Mining Company. Motion for a rehearing. Filed July 10th, 1897. A. L. Richardson, clerk. W. B. Heyburn, counsel for defendant.

82 In the Circuit Court of the United States in and for the District of Idaho, Northern Division.

ROYAL J. RUTTER and F. W. BRADLEY, Complainants,
vs.
THE SHOSHONE MINING COMPANY, a Corporation, Defendant.

Bill of Exceptions No. 2.

I.

Be it remembered, that on the trial of the above-entitled cause the defendant, to maintain its contention that the plaintiffs might not maintain their said action, offered in evidence a paper, in words and figures as follows:

DEFENDANT'S EXHIBIT 2.

Notice of Assessment-work on Mining Claims.

Notice is hereby given to all whom it may concern that the Bunker Hill & Sullivan Mining and Concentrating Company has, during the year 1896, expended for underground development work in the Bunker Hill and Sullivan group of mines the sum of
83 over $50,000.00, and claims that such expenditure was made for the direct purpose of developing and holding, according

to law, all the following adjoining and contiguous mining claims, which are worked together as one group and claimed by the Bunker Hill and Sullivan Mining and Concentrating Company:

Ollie McMillan.
Miners' Delight.
Zuzuland.
Richmond.
Fraction.
Bulah.
South.
Matableland.
Allie.
Helen Marr.
Cypress.
George Arnett.
Butternut.
Josie.
Grant.
Hemlock.
Scoffield.
Whoop Up.
Buckeye.
B. W. Fraction.
No Name.
84 Sullivan Extension.
Spruce Fraction.
Alla.
Overlap.
Aspen.
Bought Again.
Tamarack.
East.
Mashonaland.
Blue Bird.
Offset.
Sullivan Fraction.
Bonanza Fraction.
Essex.
Homestake.
Silver.
Sancho Fraction.
Iron Hill.
Harris.
Maple.
Bullion.
Stemwinder Fraction.
Stopping.
Krouger.
La Crosse.
W. H. Fraction.
Ben Herr.
Sarnie.
Mabundaland.
Rookery.
Kirby Fraction.
Triangle Fraction.
Miles.
Hickory.
African Reef.
Johannesburg.
Summit.
Stemwinder.

BUNKER HILL AND SULLIVAN MINING AND CONCENTRATING COMPANY,
By F. W. BRADLEY, *Manager.*

We, the undersigned, on the second and third days of December, 1896, have posted a copy of this notice on each of the above-mentioned mining claims.

LLEWELLYN LLEWELLYN.
GEORGE A. SONNEMAN.

Recorded at the request of F. W. Bradley, December 7th, 1896, at 9 o'clock a. m.

BARRY N. HILLARD,
County Recorder,
By JOHN P. SHEEHY, *Deputy.*

To the admission in evidence of which plaintiffs objected, which objection was sustained by the court, to which defendant excepted, which exception was then and there allowed.

And thereafter, at said trial, the defendant offered in evidence that certain paper, in words and figures as follows:

85 DEFENDANT'S EXHIBIT 3.

Proof of Labor.

STATE OF IDAHO, } ss:
County of Shoshone, }

Before me, the subscribed, personally appeared F. W. Bradley, who, being first duly sworn, says that he is the agent for the Bunker Hill and Sullivan Mining and Concentrating Company, and that during the year 1896, at least $50,000.00 has been expended for underground development work in the Bunker Hill and Sullivan group of mines, which consist of the following lode mining claims:

Ollie McMillan.
Miners' Delight.
Zuzuland.
Richmond.
Fraction.
Bulah.
South.
Matableland.
Allie.
Helen Marr.
Cypress.
George Arnett.
Butternut.
Josie.
Grant.
Hemlock.
Scoffield.
86 Stemwinder Fraction.
Stopping.
Krouger.
La Crosse.
W. H. Fraction.
Ben Herr.
Sarnie.
Mabundaland.
Rookery.
Kirby Fraction.
Spruce Fraction.
Alla.
Whoop Up.
Buckeye.
B. W. Fraction.
No Name.
Sullivan Extension.
Blue Bird.
Offset.
Sullivan Fraction.
Bonanza Fraction.
Essex.
Homestake.
Silver.
Sancho Fraction.
Iron Hill.
Harris.
Maple.
Bullion.
Overlap.
Aspen.
Bought Again.
Tamarack.
East.
Mashonaland.
Triangle Fraction.
Miles.
Hickory.
African Reef.
Johannesburg.
Summit.
Stemwinder.

Situated in Yreka mining district, Shoshone county, Idaho, and that such expenditure was made for the direct development of the said group of contiguous mining claims, at the expense of the Bunker Hill and Sullivan Mining and Concentrating Company, owner of said group of claims, for the purpose of holding all of the above mentioned lode mining claims.

F. W. BRADLEY.

Subscribed and sworn to before me this 4th day of December, 1896.

M. J. SINCLAIR,
Notary Public.

87 Recorded at the request of F. W. Bradley, Dec. 7th, 1896, at 9 o'clock a. m.

BARRY N. HILLARD,
County Recorder,
By JOHN P. SHEEHY, *Deputy.*

To the admission in evidence of which the plaintiffs objected, which objection was sustained by the court, to which the defendant excepted, which exception was then and there allowed.

And thereafter, at the said trial, the defendant offered in evidence a paper, in words and figures as follows:

DEFENDANT'S EXHIBIT 4.

Proof of Labor.

STATE OF IDAHO, }
County of Shoshone, } ss:

Before me, the subscriber, personally appeared F. W. Bradley, who, being first duly sworn, says that during the year 1895 at least $30,000.00 has been expended for underground development work in the Bunker Hill and Sullivan group of mines, which consist of the following lode mining claims, viz:

	Ollie McMillan.	Blue Bird.
	No Name.	Rookery.
	Sarnia.	Richmond.
	Miners' Delight.	Offset.
	Sullivan Extension.	Kirby Fraction.
	Mabundaland.	Fraction.
	Zuzuland.	Sullivan Fraction.
88	Bulah.	Iron Hill.
	Bonanza Fraction.	East.
	Alla.	George Arnett.
	South.	Harris.
	Essex.	Mashonaland.
	Overlap.	Butternut.
	Matableland.	Maple.

Homestake.	Triangle.
Aspen.	Josie.
Allie.	Bullion.
Silver.	Miles.
Bought Again.	Grant.
Helen Marr.	Stemwinder Fraction.
Sancho Fraction.	Hemlock.
Cypress.	

Situate in Yreka mining district, county of Shoshone, State of Idaho; that such expenditure was made for the direct development of the said group of contiguous mining claims at the expense of the Bunker Hill and Sullivan Mining and Concentrating Company, owner of said group of claims, for the purpose of holding said group of claims.

F. W. BRADLEY.

Subscribed and sworn to before me this 10th day of December, 1895.

[SEAL.] M. J. SINCLAIR,
Notary Public.

89 Recorded at the request of F. W. Bradley, Dec. 13, 1895, at 9 o'clock a. m.

BARRY N. HILLARD,
County Recorder,
By L. A. DOHERTY, *Deputy.*

To the admission in evidence of which plaintiffs objected, which objection was sustained, to which defendant excepted, which exception was then and there allowed.

That thereafter, at the trial of said cause, the defendant offered in evidence a certain paper, in words and figures as follows:

DEFENDANT'S EXHIBIT 5.

Notice of Assessment-work on Mining Claims.

Notice is hereby given to all whom it may concern that the Bunker Hill and Sullivan Mining and Concentrating Company has during the year 1895 expended for underground development work in the Bunker Hill and Sullivan group of mines the sum of $30,000.00, and claims that such expenditure was made for the direct purpose of developing and holding according to law all the following and adjoining and contiguous mining claims, which are worked together as one group and claimed by the Bunker Hill and Sullivan Mining and Concentrating Company:

	Ollie McMillan.	No Name.
	Sarnia.	Miners' Delight.
90	Sullivan Extension.	Silver.
	Mabundaland.	Bought Again.
	Zuzuland.	Helen Marr.

Blue Bird.
Rookery.
Richmond.
Offset.
Kirby Fraction.
Fraction.
Sullivan Fraction.
Spruce Fraction.
Bulah.
Bonanza Fraction.
Alla.
South.
Essex.
Overlap.
Matableland.
Homestake.
Aspen.
Allie.
Sancho Fraction.
Tamarack.
Cypress.
Iron Hill.
East.
George Arnett.
Harris.
Mashonaland.
Butternut.
Maple.
Triangle.
Josie.
Bullion.
Miles.
Grant.
Stemwinder Fraction.
Hickory.
Hemlock.

BUNKER HILL AND SULLIVAN MINING AND CONCENTRATING COMPANY,
By F. W. BRADLEY, *Manager.*

91 We, the undersigned, on the 11th to 14th days of December, 1895, have posted a copy of this notice on each of the above-mentioned mining claims.

GEORGE A. SONNEMAN.
WM. S. HARRIS.
LLEWELLYN LLEWELLYN.

Recorded at the request of F. W. Bradley, Dec. 17th, 1895, at 2 o'clock p. m.

BARRY N. HILLARD,
County Recorder,
By L. A. DOHERTY, *Deputy.*

To the admission in evidence of which plaintiffs objected, which objection was sustained by the court, to which the defendant excepted, which exception was then and there allowed.

Be it further known, that at the trial of this cause the plaintiff, Royal J. Rutter, being on the witness stand, and sworn to testify as a witness, on cross-examination was asked by defendant's counsel:

"Q. Is it not a fact that the Bunker Hill and Sullivan Mining and Concentrating Company paid for the assessment-work on that claim in 1895?

A. The money comes out of me.

Q. How do you mean comes out of you?

A. Well, that was the agreement Mr. Bradley and I has got.

Q. What is the agreement?

A. I paid for it."

92 Counsel for plaintiff here interposed an objection as follows:

I object to going into this thing any further. It is simply a question of whether the money was paid; as to where he got the money—I don't think he has any right to inquire where Mr. Rutter got the money, even if he stole it from some bank.

The COURT: I suppose counsel is attempting to show that this is not his property.

(Objection sustained.)

Mr. HEYBURN: Your honor holds that we cannot show by parol that he does not own the property?

The COURT: I sustain the objection to the question as to the relation between him and Mr. Bradley. He says that he is responsible for the money.

Mr. HEYBURN: I propose to show that neither Mr. Rutter nor Mr. Bradley have any interest in this property; that it belongs to the Bunker Hill and Sullivan Mining and Concentrating Company; that they are simply allowing it to remain in the name of these individuals for such benefit as they may derive from litigation concerning it; that Mr. Rutter has disposed of his interest; that Mr. Bradley holds the interest for the Bunker Hill and Sullivan, and that the Bunker Hill and Sullivan are the real parties in interest and the only parties who can maintain this action.

93 The COURT: So far as this case is concerned, it seems to me the only question here is as to the title between these two parties.

The court thereupon overruled the offer, and refused to allow the proofs offered to show that the plaintiffs have no present interest in the "Kirby" claim, to which ruling the defendant then and there excepted, which exception was duly allowed.

III.

Be it further known, that when the plaintiffs' witness, Frank C. Loring, was on the witness stand, being duly sworn to testify as a witness in this case, he testified that he was a deputy mineral surveyor, and that in 1889, under an official order of survey, he surveyed the "Kirby" claim for patent; that he was employed to make this survey by Mr. Spaulding, whom it appears, under the testimony in the case, had at that time a bond on the claim, and was in possession thereof, and who testified that he employed Mr. Loring by authority of the owners of the claim. That under his contract with the owners it was understood that he should go ahead and make the survey for patent. That he was in possession of the property under bonds from the owners from March, 1889, to July, 1892, and had the exclusive possession of the property during that time. That during the said time he had Mr. Loring make said sur-

94 vey for patent. That the southwest corner was drawn in by Mr. Loring under his directions to make the west end line parallel with the east end line.

Mr. Loring testified that the small map, Defendant's Exhibit No. 2, was made by him and given to Mr. Spaulding.

It appears from the testimony that the notes of this official survey were not forwarded to the surveyor general's office at any time because of some delay or difficulty about the payment for the survey by Spaulding.

Loring testifies, however, that he placed the official corners at the end of the survey as made by him and as indicated upon the small map, Defendant's Exhibit 2, and, so far as the testimony of the case shows, those official posts remained there up to the present time.

Mr. Loring testified that he did not draw in the southwest corner by any special authority from the owners of the "Kirby" claim; that he didn't report his action thereon to the owners, but to Mr. Spaulding only.

IV.

The defendant, The Shoshone Mining Company, excepts to the decision of the court wherein it holds as follows:

"Is the place of the posting the notice of an underground discovery important?

It seems in this case to have been so regarded, and the locator of the 'Shoshone' attempted to post his notice upon the surface marked on the plat 'Shoshone disc.,' perpendicularly over
95 the place of the underground discovery. The 'Kirby,' as originally located, is indicated by the lines 1, 2, 3, 4, and 5. Some time after its location it was bonded to certain parties, and an official survey for patent was made of it in the form indicated by the lines 1, 2, 6, and 7; which did not include the place where the 'Shoshone' notice was posted, but as now surveyed and indicated by the lines 3, 5, 8, and 9, such place is included. The defendant company insists that the 'Shoshone' notice was posted in view of such first survey, and so that it might not be within the limits of any other claim, and that the 'Kirby' should be bound by such first survey. There can be no doubt that if owners of the 'Kirby' authorized such survey, they could not subsequently so change it as to interfere with intervening attaching rights. It is, however, claimed by the 'Kirby' owners that such first survey was unauthorized by them, and was procured alone upon the motion of the party to whom they had bonded the claim.

As I view the law, these questions are not material. In the first place, it is questionable what surface rights accrue to the discoverer of a ledge under the tunnel-site law, that statute—section 2223—only grants: 'Where a tunnel is run for the development of a vein or lode, or for the discovery of mines—the right of possession of all veins—not previously known to exist, discovered in such tunnel to the same extent as if discovered from the surface.'

This gives a right only to the vein discovered, not previously known to exist. It grants no surface rights nor other vein than that discovered, but to this the same rights in extent, as if dis-
96 covered from the surface. I think the only reference in the law to surface rights is that in section 2322, which treats alone of locations made of ledges discovered upon the surface, whereby certain surface is granted, together with every ledge whose apex is

within such surface. To apply all the rights granted by this section to a discovery under section 2323 would be a most liberal construction. It would be granting to the locator all ledges apexing within the surface location he might make, even when the apex of the ledge he actually discovered far underground might be without the boundaries of the surface located.

Whatever should be the construction of the law, it has made no direct provision for surface rights for ledges discovered under the tunnel-site law, yet it is reasonable to presume that necessary surface rights are implied. But should they not be where they can be of utility? The original idea of surface rights was only for the purpose of working the vein and only the vein discovered. Surface rights on the top of a hill of a vein discovered far underground can be of no practical value to such vein.

Again: The law makes no provision for the posting of any notice of a ledge discovered under section 2323, but it may be fairly presumed that some notice to the world, aside from the tunnel-site location notice, should be made that it may be known where in the tunnel the ledge is situated, and in what direction, and how far from the place of discovery it is claimed; but these purposes are more fully answered by placing such notice at the mouth of the
97 tunnel, where prospect-s are more likely to go to ascertain what rights are claimed through the tunnel, and where surface rights could be made useful. Certainly, it serves no useful purpose to place such notice perpendicularly over the discovery, for there is not the least probability that this is on or over the apex which is most likely, in cases of a deep discovery, to be beyond the boundaries of the surface so located, and a notice so posted is likely rather to mislead than direct another prospector, who may find the apex beyond such surface limits.

Certainly, under the congressional mining act the place of posting the notice of even a location based upon a surface discovery is not important. The apex of the ledge must be within the surface claimed, while, independent of local laws, the notice might be elsewhere, if sufficiently near and sufficiently definite in its description to define the discovery and the claim. The place of the ledge discovery, and not that of the posting of the notice, is the more important question. This was in effect long since held in the case of Phillpots *v.* Blasdel, 8 Nev. But whatever the law may be, modified as it is by local laws, as to the place of posting the notice of a surface discovery, I think the notice of a discovery made far underground may be posted at any point upon the surface which is likely to give notice of the location of the ledge discovered, and that it is immaterial whether the place of posting is within the limits of another claim or not. It does not appear from the pleadings that the 'Shoshone' claim was located in pursuance of section
98 2323, but it does appear that the alleged discovery is far underground, and that the notice was posted immediately over the place, not to mark where the apex of the ledge is, but where underground the discovery was made, and I hold that as to

the posting of the 'Shoshone' notice it is valid, even within the limits of another valid claim," which exception is duly allowed.

V.

The defendant, The Shoshone Mining Company, excepts to the decision of the court wherein it holds as follows:

"Can a location be so based upon the alleged discovery of a ledge in its subterranean depths, which has been previously discovered and located upon the surface, is an important question affecting the validity of the 'Shoshone' claim.

It is admitted that the ledge upon which the 'Shoshone' is located is the same which apexes in prior locations, to wit, the Bunker Hill, Stemwinder, Emma, Last Chance, and Tyler, and that the apex of the ledge runs through these claims as indicated by the line of flags, numbered 3 to 10, inclusive, upon the plat. There can be no doubt that the entire apex of that part of this ledge upon which the 'Shoshone' is located is covered by these several claims, yet it so happens, either under the absurdities of the mining law or its erroneous interpretation, that while the entire apex of a ledge may be covered by several claims, they may not altogether
99 hold all portions of the ledge in its underground depths. If it were clear by the evidence in this case that the several claims, which have the apex of the ledge, can follow it in its depths under the 'Shoshone,' it would be equally clear that the 'Shoshone' would be invalid, but it is argued that some of these claims have no extralateral rights. It is settled that when a claim is so located, that the apex crosses the side lines they become end lines, between whose planes the ledge can be followed, but it is also argued here that when those planes are more along the course of than across the ledge, that the ledge cannot be followed beyond the boundaries of the claim. It is true, as suggested by counsel, that this court once instructed a jury (but with much doubt) that a ledge could not be followed more on its course than on its dip, and it does seem absurd, when the law says ledges may be followed on their 'depths,' for the courts instead to say they may be followed along their 'course.' But the court of appeals did not by word affirm this instruction of this court, nor has the rule been supported by any court save a *nisi prius* court in Utah Territory. It would seem that the only logical conclusion of the holdings of the courts that ledges must be followed between the planes of the lines they cross is that they may be followed indefinitely between those planes prolonged; for to say that when such following would be more along the course than on the dip you must stop at the side boundary line of the claim, is making
100 a new law, which Congress never authorized. If there is any one right specially granted by Congress it is to follow the ledge indefinitely on its depth, which the miner has always claimed and done, only he followed it on its dip, which to some extent the courts have unfortunately felt constrained, under their views of the law, to modify.

While I am inclined to think that the Stemwinder and the other claims named have such extralateral rights as will include this vein

under the 'Shoshone,' I do not think that question can be determined in this case without further testimony, but it may be said that if there is any portion of the ledge within the 'Shoshone' which is not covered by their extralateral rights, it will belong to the 'Shoshone' if this latter claim is not void as against the 'Kirby,'" which exception is duly allowed.

VI.

The defendant, The Shoshone Mining Company, excepts to the decision of the court wherein it holds as follows:

"Is the 'Kirby' a valid location?

It is said that it is void because relocated before the 'Edith' location—which was substantially the same ground—had become forfeited or abandoned. Of course, it is clear that ground once located cannot be relocated by other parties until forfeiture or abandonment of the first location. Citations on this question are unnecessary.

It has been said that the locators of the 'Edith' did not in-
101 tend to abandon it before locating the 'Kirby.' The fact is they did not intend to abandon the ground, but only the name. The same parties who located the 'Edith' concluded to add to their ground as first located, and did so by changing their lines and locating as the 'Kirby.' I cannot doubt the right of locators to change their lines as well as the names of their claims as often as they desire, so long as they do not interfere with other rights. Any change in the name of the claim or its boundaries by the owners thereof certainly is good from the day when change is made, if no other rights have intervened, and the location or relocation, if it may be so termed, of this ground as the 'Kirby' is good from the day of such location.

That subsequently, deeds were made by the parties of the 'Edith' does not prove that they considered that both the 'Edith' and 'Kirby' were in existence, but this only shows that some overcautious attorney perhaps, or whoever may have so advised, had an unnecessary thing done, as a matter of precaution. It is not the name, but the ground that is conveyed. The name only designates or identifies the ground; it may be conveyed by metes and bounds as effectively as by a name, and a conveyance by any name conveys the ground, though it may be known by many names," which exception is duly allowed.

VII.

The defendant, The Shoshone Mining Company, excepts to the decision of the court wherein it holds as follows:

102 "Has the 'Kirby' a ledge?

Were it required that the evidence should remove all reasonable doubt, I should answer this question in the negative, but under the liberal rule that prevails as to the constitution of a ledge within the law, I think the preponderance of evidence is in favor of such a discovery. It does, however, sometimes appear that the rule that a ledge within the law is that 'which the miner would follow with the hope of finding ore' is often carried so far as to lead

to a perversion of the intent of the law. It results that almost any kind of a crevice filled with matter differing from the general country rock is held a sufficient ledge upon which to base a location, and as a result all mining countries are plastered over with locations as worthless as the lava beds of this great interior basin," which exception is duly allowed.

VII.

The defendant, The Shoshone Mining Company, excepts to the decision of the court wherein it holds as follows:

"Just when this discovery was made I have not taken time to determine from the testimony, except that it was before the location of the 'Shoshone,' which, under the weight of authority, is considered sufficient. While I personally feel that any location of a mining claim made before the discovery of a vein or lode within its limits should be held void *ab initio*, such opinion must
103 yield to what is deemed the preponderance of authority. Certainly, it is not claimed here that the location of a claim without the discovery of a ledge is valid prior to such discovery, or is valid against another valid location made," which exception is duly allowed.

VIII.

The defendant, The Shoshone Mining Company, excepts to the decision of the court wherein it holds as follows:

"It seems altogether probable that whatever ledge the plaintiffs have is but a spur or a part of the main ledge passing through the other claims named, the apex wherein is indicated as above stated, but until it descends and becomes a part of such ledge, the plaintiffs are entitled to it.

It has also been suggested that thus far the plaintiffs' ledge has not been proven a valuable one—that is not necessary. If it is sufficient in the beginning to justify a location, which I have reluctantly held, it is sufficient for all time, even if it never becomes valuable," which exception is duly allowed.

IX.

The defendant, The Shoshone Mining Company, excepts to the decision of the court, wherein it holds as follows:

"The whole case considered, it must be held that the 'Kirby' is a valid location and prior to the 'Shoshone,' and that the
104 plaintiffs are entitled to judgment therefor against the defendant for a patent to the ground in dispute between the parties and to their costs, and it is ordered accordingly," which exception is duly allowed.

And the defendant prays that this, its bill of exceptions, may be allowed, settled, and sealed.

W. B. HEYBURN,
Counsel for Defendants.

Settled and allowed this 19th day of October, 1897.

JAS. H. BEATTY, *Judge.*

(Endorsed:) No. 81. In the United States circuit court, ninth judicial circuit, in and for the district of Idaho, northern division. Royal J. Rutter *et al. vs.* Shoshone Mining Company. Bill of exceptions (original). Service accepted Oct. 19th, 1897. Jno. R. McBride. Filed Oct. 19th, 1897. A. L. Richardson, clerk.

105 In the United States Circuit Court in and for the District of Idaho, Northern Division. In Equity.

ROYAL J. RUTTER and F. W. BRADLEY, Complainants,
vs.
THE SHOSHONE MINING COMPANY, a Corporation, Defendant. } No. 81.

Assignment of Errors on Appeal.

And now, on this 19th day of October, A. D. 1897, comes the said defendant, by W. B. Heyburn, Esq., its solicitor, and says that the decree in said cause is erroneous and against the just rights of the said defendant for the following reasons:

First. That it appears upon the face of the bill that the plaintiffs have an adequate remedy at law.

Second. That the said plaintiffs have not, in or by said bill, made or stated such a cause as doth or ought to entitle them to any such discovery or relief as is thereby sought or prayed for, from or against this defendant.

106 Third. Because that it does not appear that the action is one arising under the Constitution or laws of the United States.

Fourth. Because the court refused to admit in evidence Defendant's Exhibit 4, being the affidavit of plaintiff Bradley that during the year 1895 the Bunker Hill and Sullivan Mining and Concentrating Company did the annual assessment-work upon the "Kirby Fraction" claim as the owner thereof, which is in words and figures as follows:

DEFENDANT'S EXHIBIT 4.

Proof of Labor.

STATE OF IDAHO,
County of Shoshone, } *ss:*

Before me personally appeared F. W. Bradley, who, being first duly sworn says that during the year 1896 at least $30,000.00 has been expended for underground development work in the Bunker Hill and Sullivan group of mines, which consist of the following lode mining claims, viz:

Ollie McMillan.	Mabundaland.
No Name.	Zuzuland.
Sarnia.	Blue Bird.
Miners' Delight.	Richmond.
Sullivan Extension.	Rookery.

107

Offset.	Sancho Fraction.
Kirby Fraction.	Cypress.
Fraction.	Iron Hill.
Sullivan Fraction.	East.
Bulah.	George Arnett.
Bonanza Fraction.	Harris.
Alla.	Mashonaland.
South.	Butternut.
Essex.	Maple.
Overlap.	Triangle.
Matableland.	Josie.
Homestake.	Bullion.
Aspen.	Miles.
Allie.	Grant.
Silver.	Stemwinder Fraction.
Bought Again.	Hemlock.
Helen Marr.	

Situate in Yreka mining district, county of Shoshone, State of Idaho; that such expenditure was made for the direct development of the said group of contiguous mining claims, at the expense of the Bunker Hill and Sullivan Mining and Concentrating Company, owner of said group of claims, for the purpose of holding said group of claims.

F. W. BRADLEY.

Subscribed and sworn to before me this 10th day of December, 1895.

[SEAL.] M. J. SINCLAIR,
Notary Public.

108 Recorded at the request of F. W. Bradley, Dec. 13, 1895, at 9 o'clock a. m.

BARRY N HILLARD,
County Recorder,
By L. A. DOHERTY, *Deputy.*

Fifth. Because the court refused to admit in evidence defendant's Exhibit 5, being the notice of assessment-work on the "Kirby Fraction" claim for the year 1895, made and filed by plaintiff Bradley, as manager of the Bunker Hill and Sullivan Mining and Concentrating Company, which said notice is in words and figures as follows:

DEFENDANT'S EXHIBIT 5.

Notice of Assessment-work on Mining Claims.

Notice is hereby given to all whom it may concern, that the Bunker Hill and Sullivan Mining and Concentrating Company has, during the year 1895, expended for underground development work in the Bunker Hill and Sullivan group of mines the sum of $30,000.00, and claims that such expenditure was made for the di-

rect purpose of developing and holding according to law all the following and adjoining and contiguous mining claims, which are worked together as a group, and claimed by the Bunker Hill and Sullivan Mining and Concentrating Company:

109	Ollie McMillan.	Aspen.
	No Name.	Allie.
	Sarnia.	Silver.
	Miners' Delight.	Bought Again.
	Sullivan Extension.	Helen Marr.
	Mabundaland.	Sancho Fraction.
	Zuzuland.	Tamarack.
	Blue Bird.	Cypress.
	Rookery.	Iron Hill.
	Richmond.	East.
	Offset.	George Arnett.
	Kirby Fraction.	Harris.
	Fraction.	Mashonaland.
	Sullivan Fraction.	Butternut.
	Spruce Fraction.	Maple.
	Bulah.	Triangle.
	Bonanza Fraction.	Josie.
	Alla.	Bullion.
	South.	Miles.
	Essex.	Grant.
	Overlap.	Stemwinder Fraction.
	Matableland.	Hickory.
	Homestake.	Hemlock.

BUNKER HILL AND SULLIVAN MINING AND CONCENTRATING COMPANY,
By F. W. BRADLEY, *Manager.*

110 We, the undersigned, on the 11th to 14th days of December, 1895, have posted a copy of this notice on each of the above-mentioned mining claims.

GEORGE A. SONNEMAN.
WM. S. HARRIS.
LLEWELLYN LLEWELLYN.

Recorded at the request of F. W. Bradley Dec. 17, 1895, at 2 o'clock p. m.

BARRY N. HILLARD,
County Recorder,
By L. A. DOHERTY, *Deputy.*

Sixth. Because the court refused to admit in evidence Defendant's Exhibit 3, being the affidavit of plaintiff Bradley that during the year 1896 the Bunker Hill and Sullivan Mining and Concentrating Company did the annual assessment-work upon the "Kirby Fraction" claim, as the owner thereof, in words and figures as follows:

DEFENDANT'S EXHIBIT 3.

Proof of Labor.

STATE OF IDAHO, } ss:
County of Shoshone, }

Before me personally appeared F. W. Bradley, who being first duly sworn, says that he is the agent for the Bunker Hill and Sullivan Mining and Concentrating Company, and that during
111 the year 1896 at least $50,000.00 has been expended for underground development work on the Bunker Hill and Sullivan group of mines, which consist of the following lode mining claims:

Ollie McMillan.
Miners' Delight.
Zuzuland.
Zuzuland.
Fraction.
Bulah.
South.
Matableland.
Allie.
Helen Marr.
Cypress.
George Arnett.
Butternut.
Josie.
Grant.
Hemlock.
Schoffield.
Whoop Up.
Buckeye.
B. W. Fraction.
No Name.
Sullivan Extension.
Blue Bird.
Offset.
112 Bought Again.
Tamarack.
East.
Mashonaland.
Triangle Fraction.
Sullivan Fraction.
Bonanza Fraction.
Essex.
Homestake.
Silver.
Sancho Fraction.
Iron Hill.
Harris.
Maple.
Bullion.
Stemwinder Fraction.
Stopping.
Krouger.
La Crosse.
W. H. Fraction.
Ben Herr.
Sarnie.
Mabundaland.
Rookery.
Kirby Fraction.
Spruce Fraction.
Alla.
Overlap.
Aspen.
Miles.
Hickory.
African Reef.
Johannesburg.
Summit.
Stemwinder.

Situated in Yreka mining district, Shoshone county, Idaho, and that such expenditure was made for the direct development of said group of contiguous mining claims at the expense of the Bunker Hill and Sullivan Mining and Concentrating Company, owner of

said group of claims, for the purpose of holding all of the above-mentioned lode mining claims.

F. W. BRADLEY.

Subscribed and sworn to before me this 4th day of December, 1896.

M. J. SINCLAIR,
Notary Public.

Recorded at the request of F. W. Bradley, Dec. 7th, 1896, at 9 o'clock a. m.

BARRY N. HILLARD,
County Recorder,
By JOHN P. SHEEHY, *Deputy.*

Seventh. Because the court refused to admit in evidence
113 Defendant's Exhibit 2, being the notice of assessment-work on the "Kirby Fraction" claim for the year 1896, made and filed by plaintiff Bradley, as manager of the Bunker Hill and Sullivan Mining and Concentrating Company, which said notice is in words and figures, as follows:

DEFENDANT'S EXHIBIT 2.

Notice of Assessment-work on Mining Claims.

Notice is hereby given to all whom it may concern that the Bunker Hill and Sullivan Mining and Concentrating Company has during the year 1896 expended for underground development work in the Bunker Hill and Sullivan group of mines the sum of over $50,000.00, and claims that such expenditure was made for the direct purpose of developing and holding according to law all the following adjoining and contiguous mining claims, which are worked together as one group, and claimed by the Bunker Hill and Sullivan Mining and Concentrating Company:

Ollie McMillan.
Miners' Delight.
Zuzuland.
Richmond.
Fraction.
South.
Matableland.
114 Hemlock.
Schoffield.
Whoop Up.
Buckeye.
B. W. Fraction.
No Name.
Sullivan Extension.
Blue Bird.
Offset.
Allie.
Helen Marr.
Cypress.
George Arnett.
Butternut.
Josie.
Grant.
La Crosse.
W. H. Fraction.
Ben Herr.
Sarnie.
Mabundaland.
Rookery.
Kirby Fraction.
Alla.
Overlap.

Bonanza Fraction.	*Aspen.*
Essex.	Bought Again.
Homestake.	Tamarack.
Silver.	East.
Sancho Fraction.	Mashonaland.
Iron Hill.	Triangle Fraction.
Harris.	Miles.
Maple.	Hickory.
Bullion.	African Reef.
Stemwinder Fraction.	Johannesburg.
Stopping.	Summit.
Krouger.	Stemwinder.

BUNKER HILL AND SULLIVAN MINING AND CONCENTRATING COMPANY,
By F. W. BRADLEY, *Manager.*

Eighth. Because the court refused to allow the defendant to show by Mr. Rutter, when on the witness stand, that neither Mr.
115 Rutter nor Mr. Bradley had any interest in the "Kirby Fraction" claim, but that it belonged to the Bunker Hill and Sullivan Mining and Concentrating Company, and that they were simply allowing it to remain in the name of these individuals for such benefit as they might derive from said title so remaining during the litigation concerning the same; that Mr. Rutter has disposed of his interest in said company, and that Mr. Bradley holds the interest standing in his name for the Bunker Hill and Sullivan Mining and Concentrating Company, and that said Bunker Hill and Sullivan Mining and Concentrating Company are the real parties in interest, and the only parties who can maintain this action.

Ninth. Because the court refused to allow the defendant to show on cross-examination of complainant Bradley, that he was not the real owner of any interest in the premises sued for. But that the Bunker Hill and Sullivan Mining and Concentrating Company was the real owner of said premises.

Tenth. Because the court refused to allow the defendant's counsel to inquire of the said Bradley, while on the witness stand, as to whether or not all of the work that had been done upon the "Kirby Fraction" claim for the years 1894, 1895 and 1896 had not been done by the Bunker Hill and Sullivan Mining and Concentrating Company, and paid for by them, and whether or not he did not file the sworn statement relative to the doing of said work, as shown by Defendant's Exhibits 2, 3, 4 and 5.

116 Eleventh. Because the court held at the trial, when U. S. Deputy Mineral Surveyor Mr. Loring was on the witness stand, and was inquired of as to the point of discovery indicated and established by him in making the official survey, what his instructions were from the surveyor general in regard thereto, that if such instructions were given, they were absolutely void, and that the point fixed as the discovery by the surveyor in making the official survey was immaterial, and that he was not bound to go

there, whether the surveyor general instructed him to locate the point of discovery or not.

Twelfth. Because the evidence shows that the "Kirby Fraction" mining claim was not a valid location:

1. Because the ground had already been located as the "Edith" mining claim.

2. Because no discovery such as is required by law was made upon the "Kirby" prior to the location thereof.

3. Because no valid discovery was ever made upon the "Kirby."

Thirteenth. To the decision of the court that the discovery of the ledge within the ground located, after such location, would validate the location made without, or before a discovery.

Fourteenth. Because the evidence shows that the boundaries of the "Kirby" claim, as marked upon the ground,
117 were not as described in the bill of complaint, or in the adverse claim filed in the United States land office.

Fifteenth. Because the evidence shows that the "Shoshone" mining claim was a valid location, and entitled to recover in this action, and to receive a patent for the land claimed in its application for a patent.

Sixteenth. Because the evidence showed that the location of the "Shoshone" claim was made upon a ledge of mineral-bearing rock in place, upon the vacant and unappropriated public domain of the United States, and said location was good as against every person, and entitled the owners thereof to a patent from the United States.

Seventeenth. Because the evidence showed that no other mining claim located upon the apex of said ledge, or otherwise, was entitled to said lode, or any part thereof, as against the "Shoshone" mining claim.

Eighteenth. Because the evidence showed that the defendant was entitled to recover in this action.

Nineteenth. To the decision of the court wherein it holds as follows:

"Is the place of the posting the notice of an underground discovery important?"

118 It seems to have been so regarded in this case, and the locator of the 'Shoshone' attempted to post his notice upon the surface marked on the plat 'Shoshone disc.,' perpendicularly over the place of the underground discovery.

The 'Kirby,' as originally located, is indicated by the lines 1, 2, 3, and 4 and 5. Some time after its location it was bonded to certain parties, and an official survey for patent was made of it in the form indicated by the lines 1, 2, 6, and 7, which did not include the place where the 'Shoshone' notice was posted, but as now surveyed and indicated by the lines 3, 5, 8, and 9 such place is included. The defendant company insists that the 'Shoshone' notice was posted in view of such first survey, and so that it might not be within the limits of any other claim, and that the 'Kirby' should be bound by such first survey. There can be no doubt that if the owners of the 'Kirby' authorized such survey, they could not

subsequently so change it as to interfere with intervening attaching rights. It is, however, claimed by the 'Kirby' owners that such first survey was unauthorized by them, and was procured alone upon the motion of the party to whom they had bonded the claim.

As I view the law, these questions are not material. In the first place, it is questionable what surface rights accrue to the discoverer of a ledge under the tunnel-site law, that statute—sec. 2333—only grants: 'Where a tunnel is run for the development of a vein or lode, or for the discovery of mines, * * * the right of
119 possession of all veins * * * not previously known to exist, discovered in such tunnel to the same extent as if discovered from the surface.'

This gives a right only to the vein when discovered, not previously known to exist. It grants no surface rights nor other vein than that discovered, but to this, the same rights in extent, as if discovered from the surface. I think the only reference in the law to surface rights is that in section 2322, which treats alone of locations made of ledges discovered upon the surface, whereby a certain surface is granted, together with every ledge whose apex is within such surface. To apply all the rights granted by this section to a discovery under section 2323 would be a most liberal construction. It would be granting to the locator all ledges apexing within the surface location he might make, even when the apex of the ledge he actually discovered far underground might be without the boundaries of the surface located.

Whatever should be the construction of the law, it has made no direct provision for surface rights for ledges discovered under the tunnel-site law, yet it is reasonable to presume that necessary surface rights are implied. But should they not be where they can be of utility? The original idea of surface rights was only for the purpose of working the vein and only the vein discovered. Surface rights on the top of a hill of a vein discovered far underground can be of no practical value to such vein.

120 Again: The law makes no provision for the posting of any notice of a ledge discovered under section 2323, but it may be fairly presumed that some notice to the world, aside from the tunnel-site location notice, should be made, that it may be known where in the tunnel the ledge is situated, and in what direction, and how far from the place of discovery it is claimed; but these purposes are more fully answered by placing such notice at the mouth of the tunnel, where prospectors are more likely to go to ascertain what rights are claimed through the tunnel, and where surface rights could be made useful. Certainly it serves no useful purpose to place such notice perpendicularly over the discovery, for there is not the least probability that this is on or over the apex, which is most likely, in cases of deep discovery, to be beyond the boundaries of the surface so located, and a notice so posted is likely rather to mislead than direct another prospector, who may find the apex beyond such surface limits.

Certainly, under the congressional mining act, the place of posting the notice of even a location based upon a surface discovery is not

important. The apex of the ledge must be within the surface claimed, while, independent of local laws, the notice might be elsewhere, if sufficiently near and sufficiently definite in its description to define the discovery and the claim. The place of the ledge discovery and not that of the posting of the notice, is the more important question. This was, in effect, long since held in the
121 case of Phillpots *v.* Blasdel, 8 Nev. But whatever the law may be, modified as it is by local laws, as to the place of posting the notice of a surface discovery, I think the notice of a discovery made far underground may be posted at any point upon the surface which is likely to give notice of the location of the ledge discovered, and that it is immaterial whether the place of posting is within the limits of another claim or not. It does not appear from the pleadings that the 'Shoshone' claim was located in pursuance of section 2323, but it does appear that the alleged discovery is far underground and that the notice was posted immediately over the place, not to mark where the apex of the ledge is, but where underground the discovery was made, and I hold that as to the posting of the 'Shoshone' notice, it is valid, even within the limits of another valid claim."

Twentieth. The decision of the court wherein it holds as follows:

"Can a location be so based upon the alleged discovery of a ledge in its subterranean depths, which has been previously discovered and located upon the surface, is an important question affecting the validity of the 'Shoshone' claim?

It is admitted that the ledge upon which the 'Shoshone' is located is the same which apexes in prior locations, to wit: the Bunker Hill, Stemwinder, Emma, Last Chance, and Tyler, and that the apex of the ledge runs through these claims as indicated by the line of flags, numbered 3 to 10 inclusive, upon the plat. There can
122 be no doubt that the entire apex of that part of this ledge, upon which the 'Shoshone' is located, is covered by these several claims yet it happens either under the absurdities of the mining law, or its erroneous interpretation, that while the entire apex of the ledge may be covered by several claims, they may not altogether hold all portions of the ledge in its underground depths. If it were clear by the evidence in this case that the several claims, which have the apex of the ledge, can follow it in its depths under the 'Shoshone,' it would be equally clear that the 'Shoshone' would be invalid, but it is argued that some of these claims have extra-lateral rights. It is settled that when a claim is so located that the apex crosses the side lines, they become end lines, between whose planes the ledge can be followed, but it is also argued here that when those planes are more along the course of than across the ledge, that the ledge cannot be followed beyond the boundaries of the claim. It is true, as suggested by counsel, that this court once instructed a jury (but with much doubt) that a ledge could not be followed more on its course than on its dip, and it does seem absurd when the law says ledges may be followed on their 'depths,' for the courts instead to say that they may be followed along their 'course.' But the court of appeals did not by word affirm this instruction of

this court, nor has the rule been supported by any court save a *nisi prius* court in Utah Territory. It would seem that the only
123 logical conclusion of the holdings of the courts that ledges must be followed between the planes of the lines they cross is that they may be followed indefinitely between those planes prolonged; for to say when such following would be more along the course than on the dip you must stop at the side boundary line of the claim, is to make a new law which Congress never authorized. If there is any one right specially granted by Congress, it is to follow the ledge indefinitely on its depths, which the miner has always claimed and done, only he followed it on its dip, which to some extent the courts have unfortunately felt constrained, under their views of the law, to modify.

While I am inclined to think that the Stemwinder and the other claims named have such extralateral rights as will include this vein under the 'Shoshone,' I do not think that the question can be determined in this case without further testimony, but it may be said that if there is any portion of the ledge within the 'Shoshone' which is not covered by their extralateral rights, it will belong to the 'Shoshone,' if this latter claim is not void as against the 'Kirby.'"

Twenty-first. The decision of the court wherein it holds as follows:

"Is the 'Kirby' a valid location?

It is said that it is void because relocated before the 'Edith' location—which was substantially the same ground—had become
124 forfeited or abandoned. Of course it is clear that ground once located cannot be relocated by other parties until forfeiture or abandonment of the first location. Citations upon this subject are unnecessary.

It has been said that the locators of the 'Edith' did not intend to abandon it before locating the 'Kirby.' The fact is that they did not intend to abandon the ground, but only the name. The same parties who located the 'Edith' concluded to add to their ground as first located, and did so by changing their lines and locating as the 'Kirby.' I cannot doubt the right of locators to change their lines as well as the names of their claims as often as they desire, so long as they do not interfere with other rights. Any change in the name of a claim or its boundaries by the owners thereof, certainly, is good from the day when the change is made, if no other rights have intervened and the location or relocation, if it may be so termed, of this ground as the 'Kirby' is good from the day of such location.

That subsequently deeds were made by the parties of the 'Edith' does not prove that they considered that both the 'Edith' and 'Kirby' were in existence, but this only shows that some overcautious attorney perhaps, or whoever may have advised, had an unnecessary thing done as a matter of precaution. The name only designates or identifies the ground; it may be conveyed by metes and bounds as effectively as by a name, and a conveyance by any name conveys the ground, though it may be known by many names."

125 Twenty-second. The decision of the court wherein it held as follows:

"Has the 'Kirby' a ledge?

Were it required that the evidence should remove all reasonable doubt, I should answer this question in the negative, but under the liberal rule that prevails as to the constitution of a ledge within the law, I think the preponderance of evidence is in favor of such a discovery. It does, however, sometimes appear that the rule that a ledge within the law is that 'which the miner would follow with the hope of finding ore' is often carried so far as to lead to a perversion of the intent of the law. It remains that almost any kind of a crevice filled with matter different from the general country rock is held a sufficient ledge upon which to base a location, and, as a result, all mining countries are plastered over with locations, as worthless as the lava beds of this great interior basin."

Twenty-second. The decision of the court wherein it holds as follows:

"Just when this discovery was made, I have not taken time to determine from the testimony, except that it was before the location of the 'Shoshone,' which, under the weight of authority, is considered sufficient. While I personally feel that any location of a mining claim made before the discovery of a vein or lode within its limits should be held void *ab initio*, such opinion must yield
126 to what is deemed a preponderance of authority. Certainly, it is not claimed here that the location of a claim without the discovery of a ledge is valid prior to such discovery, or is valid against another valid location made."

Twenty-third. The decision of the court wherein it holds as follows:

"It seems altogether probable that whatever ledge the plaintiffs have is but a spur or a part of the main ledge passing through the other claims named, the apex wherein is indicated as above stated, but until it demands and becomes a part of such ledge, the plaintiffs are entitled to it.

It has also been suggested that thus far the plaintiffs' ledge has not been proven a valuable one—that is not necessary—if it is sufficient in the beginning to justify a location, which I have reluctantly held, it is sufficient for all time, even if it never becomes valuable."

Twenty-fourth. The decision of the court wherein it holds as follows:

"The whole case considered, it must be held that the 'Kirby' is a valid location, and prior to the 'Shoshone,' and that the plaintiffs are entitled to judgment therefor against the defendant for a patent to the ground in dispute between the parties, and to their costs, and it is ordered accordingly."

127 Wherefore, the defendant prays that said decree be reversed, and that said court may be ordered to enter a decree for the defendant.

W. B. HEYBURN,
Solicitor for Defendant.

(Endorsed:) No. 81. In the district court of the first judicial district of the State of Idaho in and for Shoshone county. Rutter and Bradley, plaintiffs, *v.* Shoshone Mining Company, defendants. In equity. Assignment of error on appeal. (Original.) Service accepted Oct. 19th, 1897. John R. McBride, sol. for pl'ffs; B. Heyburn, counsel for def't. Filed Oct. 19th, 1897. A. L. Richardson, clerk.

128 In the Circuit Court of the United States in and for the District of Idaho, Northern Division. In Equity.

ROYAL J. RUTTER and F. W. BRADLEY, Complainants,
vs.
THE SHOSHONE MINING COMPANY, a Corporation, Defendant. } No. 81.

Petition for Appeal.

The above-named defendant, conceiving itself aggrieved at the decree made and entered on the 30th day of August, A. D. 1897, in the above-entitled cause, does hereby appeal from said decree to the United States circuit court of appeals for the ninth circuit, for the reasons specified in the assignment of errors, which is filed herewith, and it prays that this appeal may be allowed; and that the transcript of the record, proceedings, and papers upon which said order was made, duly authenticated, may be sent to the United States circuit court of appeals for the ninth circuit.

Dated this 19th day of October, 1897.

W. B. HEYBURN,
Solicitor for Defendant.

129 The foregoing petition for appeal is allowed.
Dated this 19th day of October, 1897.

JAS. H. BEATTY, *Judge.*

(Endorsed:) No. 81. In the United States circuit court, ninth judicial circuit, in and for the district of Idaho, northern division. Royal J. Rutter and F. W. Bradley, complainants, *vs.* The Shoshone Mining Company, def'ts. Petition for appeal. Service by copy rec'd this Oct. 19, 1897. Jno. R. McBride, sol. for def'ts. W. B. Heyburn, counsel for defendant, 303 Hyde blk., Spokane, Wash. Filed Oct. 19th, 1897. A. L. Richardson, clerk.

In the Circuit Court of the United States in and for the District of Idaho, Northern Division. In Equity.

ROYAL J. RUTTER and F. W. BRADLEY, Complainants,
vs.
THE SHOSHONE MINING COMPANY, a Corporation, Defendant. } No. 81.

130 In Equity.

THE SHOSHONE MINING COMPANY, a Corporation, Complainant,
vs.
ROYAL J. RUTTER and F. W. BRADLEY, Defendants. } No. 102.

Stipulation Consolidating Causes on Appeal.

It is hereby stipulated by and between the respective parties complainants and defendants in the above-entitled two causes, that the said causes shall be consolidated for the purpose of appeal, and that the notice and allowance of appeal, assignments of error, and undertaking in one of said causes shall be sufficient for both causes, and shall be applicable to both causes as though such notice, allowance of appeal, assignments of error, and undertaking had been allowed and filed in each of said causes. That the record, or any part thereof, in either cause shall be used and considered applicable to the other as fully as though said record had been separately made in each cause. That for all purposes on appeal, from henceforth, the said two causes shall be consolidated, and any
131 proceedings in one cause shall be applicable and effectual in the other.

Dated this 19th day of October, A. D. 1897.

JNO. R. McBRIDE,
Counsel for R. J. Rutter and F. W. Bradley.
W. B. HEYBURN,
Counsel for the Shoshone Mining Company, a Corporation.

(Endorsed:) No. 81. In the circuit court of U. S., district of Idaho, nor. division. Royal J. Rutter *et al. vs.* Shoshone Mining Company. Shoshone Mining Company *vs.* Royal J. Rutter. Consolidated cases. Stipulation. Filed Oct. 28th, 1897. A. L. Richardson, clerk.

In the Circuit Court of the United States in and for the District of Idaho, Northern Division.

ROYAL J. RUTTER and F. W. BRADLEY, Complainants,
vs.
THE SHOSHONE MINING COMPANY, a Corporation, Defendant.

Statement on Appeal.

This cause coming on regularly for trial, it was stipulated
132 in open court between the parties plaintiff and defendant, and consented to by the court, that the testimony should be taken

in open court, and such testimony should be filed in the case, together with any exceptions that might be saved to the rulings of the court and the taking of such testimony.

Whereupon, the plaintiffs introduced a certified copy of the location notice of the "Kirby" claim as recorded, which was marked Plaintiffs' Exhibit "A," and is as follows:

PLAINTIFFS' EXHIBIT "A."

Notice of Location of Quartz Claim.

Notice is hereby given to all whom it may concern that James Day, Jacob Johns, Ed. Sullivan, Elar Charlebois, citizens of the United States, over the age of twenty-one years, having discovered a vein or lode of quartz or rock in place, bearing mineral, within the limits of the claim hereby located, have this day, under and in accordance with the Revised Statutes of the United States, chapter six, title thirty-two, located 1,400 feet (fourteen hundred feet), linear feet of this vein or lode, with surface ground 400 feet (four hundred feet) in width, situated in Yreka mining district, county of Shoshone, and known as the Kirby Fraction quartz mining claim, and extending 1,250 (twelve hundred 50) feet westerly direction, and one hundred and fifty in an easterly direction, and two hundred on each side from this notice at the discovery or prospect shaft
133 which is one hundred and fifty feet from the east end line the exterior boundaries of this claim being distinctly marked by reference to some natural objects or permanent monuments, and more particularly described as follows, to wit, starting at this notice and running 150 feet westerly to post marked east center end; thence northerly two hundred feet to post marked northeast corner; thence westerly 1,400 feet to post marked northwest corner; thence southerly 200 feet to post marked west center end; thence southerly 200 feet to post marked southwest corner; thence 1,400 feet easterly to post marked northeast corner; thence northerly 200 feet to post marked east center end or place of beginning; one-half mile west of Wardner, and on the west slope of Mile creek, bounded on the north by the Last Chance lode, and on the east by what is known as the Emma lode.

Located this 11th day of July, 1886.

JAMES DAY,
ED. SULLIVAN,
JACOB JOHNS,
ELAR CHARLEBOIS, *Locators.*

COUNTY OF SHOSHONE, } ss:
Territory of Idaho, }

I, Jacob Johns, do solemnly swear that I am acquainted with the mining ground described in the notice of location herewith
134 called the Kirby Fraction ledge, lode, or claim, and that the ground and claim therein described, or any part thereof, has

not, to the best of my knowledge and belief, been heretofore located according to the laws of the United States and of this Territory, or, if so located, that the same has been abandoned or forfeited by reason of the failure of such former locators to comply in respect thereto with the requirements of said laws.

JACOB JOHNS.

Subscribed and sworn to before me this 13th day of July, 7.30 p. m., 1886.

L. F. ROBERTSON,
Deputy Recorder.

Filed for record this 13th day of July, 1886, at 7.30 p. m., at request of Jacob Johns, recorded in Book "B" of Quartz Locations, Yreka District, page 229.

L. F. ROBERTSON,
Deputy Recorder.

Recorded at the request of L. F. Robertson, Sept. 8th, 1886, at 5 p. m.

THOS. E. McLELLAND,
County Recorder,
By M. J. SWEENY, *Deputy.*

135 COUNTY OF SHOSHONE, } ss:
State of Idaho, }

I, Barry N. Hillard, county recorder in and for said county and State, do hereby certify that the above and foregoing copy of the notice of location of the Kirby Fraction Lode mining claim has been by me compared with the original, and that the same is a true and correct transcript therefrom, and of the whole thereof, as the same appears of record in Book "B" of Quartz Location-, at page 161 thereof, records of Shoshone county, Idaho, at my office and in my custody.

Witness my hand and official seal this the 3d day of December, A. D. 1894.

[SEAL.] BARRY N. HILLARD,
County Recorder.

Whereupon the plaintiffs called R. J. RUTTER, who being duly sworn, testified:

I am one of the plaintiffs in this action, and reside at Wardner or Kellogg, in the State of Idaho. I have been mostly engaged in the saw-mill business, and am at the present time employed by the Bunker Hill & Sullivan Mining Company. I am familiar with the ground known as the Kirby mining claim. I was on the ground in question some time in 1886.

Defendant objected to the competency of the testimony, on the ground that there was no proof of location, and the objection was overruled. Exception allowed.

136 Mr. Rutter further testified: I saw parties there who claimed the ground. They were Day and Sullivan—or Johns and Sullivan, I mean to say. I was acquainted with the parties at the time, and have known them since. I saw a location notice on the ground, on a tree above an open cut in the side of the hill, and men were working there at that time. They showed me the notice, and I read it. I afterwards purchased an interest in the claim.

The witness being handed a location notice testified that it was a copy of the one he saw on the tree.

I saw the notice there in the following year—April, 1887. I went up to the property some time after I purchased an interest, and the location notice had disappeared. I afterwards found it. I was there a good many times during that year. Think the location notice remained posted a year after I first saw it. Johns and Sullivan pointed out the boundaries of the claim to me, when I talked about purchasing it, some time in April, 1887. The stakes on the lower part of the hill were stakes set in the ground, and rocks piled around them. The side stakes were the same; those on top of the hill were small trees, cut down and hewed off. They had writing on them, written with a lead pencil. I went around the boundaries of the claim, found all of the posts described in my testimony. All three of the parties pointed them out to me—Day, Sullivan, and Johns. I have been on that ground at various times since; the corner stakes have

137 disappeared; don't know what became of them; they were there for a year or two—I can't remember how long. It was the lower corners that disappeared, down the mountain, next to Wardner—the southwest corner. That was a stake set in the ground. The stakes on top of the mountain that were hewn trees are still there; they were end stakes. There are three of them; they are still marked with the same marks that were on them the first time I saw them, to the best of my belief. The southeast stake on the hill is still there, with the word "Kirby" marked on it. There are no other stakes on the ground that were originally there, so far as I know. I know about where the missing stake stood.

At this time plaintiffs offered in evidence three deeds, which were objected to on the ground that no valid location has been shown, which objection was overruled and exception allowed; papers admitted and marked Plaintiffs' Exhibit "B," "C," and "D," and are as follows:

PLAINTIFFS' EXHIBIT "B."

This indenture, made the 2d day of April, in the year of our Lord, one thousand eight hundred and eighty-seven, between James Day, Jacob Johns, E. Sullivan, and Elar Charlebois, all of Shoshone county, Idaho Territory, parties of the first part, and R. J. Rutter of said county and Territory, the party of the second part.

Witnesseth: That the said parties of the first part, for and in consideration of the sum of one hundred and fifty ($150.00) dol-

138 lars, lawful money of the United States of America, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, re-

mised, released, and forever quitclaimed, and by these presents do grant, bargain, sell, remise, release and forever quitclaim unto the said party of the second part, and to his heirs and assigns, the following-described mining property, to wit:

An undivided one-half (½) interest in and to that certain lead, lode, or mining claim known as and called the "Edith" and "Kirby" claims, situate, lying, and being on the west slope of Milo creek, bounded on the north by the "Last Chance" and on the east by what is known as the "Emma" lode, about one-half (½) mile west of the town of Wardner, in Yreka mining district, Shoshone county, Idaho Territory.

Together with all the dips, spurs, and angles, and also all the metals, ores, gold, and silver bearing quartz, rock, and earth therein, and all the rights, privileges, and franchises thereto incident, appendant, and appurtenant, or therewith usually had and enjoyed; and also all and singular the tenements, hereditaments, and appurtenances thereto belonging, or in anywise appertaining, and the rents, issues, and profits thereof; and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity of said party of the first part, of, in, or to the said premises, and every part and parcel thereof with the appurtenances.

To have and to hold, all and singular, the said premises,
139 together with the appurtenances and privileges thereunto incident, unto the said party of the second part.

In witness whereof the said parties of the first part have hereunto set their hands and seal- the day and year first above written.

JAMES DAY. [SEAL.]
E. SULLIVAN. [SEAL.]
JACOB JOHNS. [SEAL.]
ELAR CHARLEBOIS. [SEAL.]

Signed, sealed, and delivered in the presence of—
H. F. GUDE.

Duly acknowledged.
Recorded on April 11th, 1887.

PLAINTIFFS' EXHIBIT "C."

This indenture, made the 17th day of May, in the year of our Lord one thousand eight hundred and eighty-seven, between Jacob Johns and Elar Charlebois, of Shoshone county, Idaho Territory, parties of the first part, and R. J. Rutter of said county and Territory, the party of the second part—

Witnesseth: That the said parties of the first part, for and in consideration of the sum of four hundred ($400.00) dollars, lawful money of the United States of America, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, remised, re-
140 leased, and forever quitclaimed, and by these presents do grant, bargain, sell, remise, release and forever quitclaim

unto the said party of the second part, and to his heirs and assigns, an undivided two-eighths (2/8) interest in and to that certain lead, lode, or mining claim, known as and called the Kirby and Edith situated, being, and lying on the south side of the Milo gulch, and bounded on the west by the Last Chance mining claim and on the north by the Emma mining claim, in Yreka mining district, Shoshone county, Idaho Territory.

Together with all the dips, spurs, and angles, and also all the metals, ores, gold, and silver bearing quartz, rock, and earth therein; and all the rights, privileges, and franchises thereto incident, appendant, and appurtenant, or therewith usually had and enjoyed; and also all and singular the tenements, hereditaments, and appurtenances thereto belonging, or in anywise appertaining, and the rents, issues, and profits thereof; and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part of, in, or to the said premises, and every part and parcel thereof, with the appurtenances.

To have and to hold, all and singular, the said premises, together with the appurtenances and privileges thereunto incident, unto the said party of the second part.

141 In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

JACOB JOHNS. [SEAL.]
ELAR CHARLEBOIS. [SEAL.]

Signed, sealed, and delivered in the presence of:
J. N. LENSON.
H. F. GUDE.

Duly acknowledged.
Recorded June 7th, 1887.

PLAINTIFFS' EXHIBIT "D."

This indenture, made the 1st day of June, in the year of our Lord, one thousand eight hundred and eighty-seven, between James Day, of Shoshone county, Idaho Territory, the party of the first part, and R. J. Rutter, of said county and Territory, the party of the second part—

Witnesseth: That the said party of the first part, for and in consideration of the sum of two hundred ($200.00) dollars, lawful money of the United States of America, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, remised, released, and forever quitclaimed, and by these presents does grant, bargain, sell, remise, release, and forever quitclaim unto the said party of the second part and to his heirs and assigns, an undivided one-eighth (1/8) interest in and to that certain lead, lode, or mining claim, known as

142 and called the Edith and Kirby quartz claim, situate, being, and lying on Milo gulch, and bounded on the east by the

Stemwinder quartz claim and on the west by the Last Chance, in Yreka mining district, Shoshone county, Idaho Territory.

Together with all the dips, spurs, and angles, and also all the metals, ores, gold, and silver-bearing quartz, rock, and earth therein and all the rights, privileges, and franchises thereto incident, appendant, and appurtenant, or therewith usually had and enjoyed; and also all and singular the tenements, hereditaments, and appurtenances thereto belonging or in anywise appertaining, and the rents, issues, and profits thereof; and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part of, in, or to the said premises, and every part and parcel thereof with the appurtenances.

To have and to hold, all and singular, the said premises, together with the appurtenances and privileges thereunto incident unto the said party of the second part. In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

JAMES DAY. [SEAL.]

Signed, sealed, and delivered in the presence of—
H. F. GUDE.

Duly acknowledged.
Recorded on the 7th of June, 1887.

143 Witness, on examining the deeds, testified that they were the deeds he had received of the parties for their interests in the claim.

Plaintiffs also introduced a certain paper, copy of which is herein set forth, showing that a one-eighth interest in the claim was obtained by advertising the interest of certain persons who failed to perform their assessment-work, which is as follows:

PLAINTIFFS' EXHIBIT "E."

Co-owner's Notice.

To Eugene Sullivan:

You, and your representatives and successors in interest, are hereby notified that the undersigned, your co owner, in accordance with the laws of the United States, has expended in labor upon the Kirby quartz mining claim, situated in Yreka mining district, Shoshone county, Idaho, the sum of one hundred dollars as assessment work for the year 1892, and you are hereby notified that unless you contribute your proportion of said expenditure, amounting to $12.50, together with the cost of this publication, within the statutory time, your interest in the said mining claim will become the property of the undersigned.

R. J. RUTTER.

First publication Jan. 14th, 1893.

144 With affidavit of the publication of the same for ninety days in the "Cœur d'Alene Barbarian," a weekly newspaper printed and published at Wardner, Shoshone county, Idaho.

This paper was objected to on the ground that it did not show a complete record of the transaction, and the objection was overruled, on the ground that it does not appear from the statute that any record is necessary in the procedure thereunder allowing one co-partner to secure the interest of another by advertising.

Mr. Rutter then further testifies: I caused that advertisement to be inserted in the paper for ninety days, and know that it was published for that length of time, and that the work which was claimed to be done on behalf of that interest was done for the year 1892. The work was done by Hill and Raspberry. The amount due by Mr. Sullivan for assessment-work on his one-eighth interest was $12 50; it was never paid, and I do not know where Mr. Sullivan is: have not seen him for eight or nine years, I guess. He left the country.

At this time plaintiffs offered in evidence a deed from Royal J. Rutter and wife to plaintiff Bradley, for an undivided one-eighth interest in the Kirby. The defendant objected to the offer on the ground that it had not been shown that there was any discovery or location of claim made. The objection was overruled, and an exception allowed.

Mr. Rutter testified: That is my deed and my signature. Ellen L. Rutter is my wife.

145 The deed was admitted and marked Plaintiffs' Exhibit "F."

Thereupon JACOB JOHNS was called on behalf of plaintiffs and testified:

I reside at Cathlamot, Wash. I am a fisherman. Was in Wardner in 1886. I located the Kirby and Edith claims in 1886, in Yreka mining district, a half mile northwest of Wardner. Referring particularly to the Kirby claim, I located it in the month of July. Edward Sullivan and James Day were with me; also a man by the name of Charlebois; he was a native born citizen. We first made a location in June, and located another claim over the top of it. We found float on the ground, indications of ore, struck a cut, and went into solid rock, and then started a tunnel. We posted a notice above where we made the discovery, between 30 and 40 feet of the place, posting it on a stump or snag, rather; could not say what kind of a notice it was. I swore to the recording of it. Think the recorder's name was Robinson. I took the notice for record. The one I had recorded was a copy of the notice posted. I remember swearing to it and filing it for record. We put up center and corner stakes. They were at least 4 feet high and 4 inches square, marked with the name of the claim and the date, I suppose. I am not sure whether the date was put on or not, but the name was on it. We put up six stakes. I cannot tell the names of the adjoining claims.

There is the Emma, the Tyler, and the Last Chance on one
146 side. We called the Kirby a fraction, because it was not a full claim. I located one before called the Edith. The stakes at the west end of the claim were hewn trees, four or five inches thick. Jim Day and Ed. Sullivan were with me at the time of marking the stakes. We marked the boundaries after posting the notice. We were digging around there before we set up the stakes, prospecting. We afterwards ran a tunnel of about 20 feet, to the best of my recollection. Sullivan and Day were with me, assisting in the work. That was some time in 1886, and followed immediately upon the location. We found iron, quartzite, clay, and mineral-bearing rock. The assayer said there was a trace in each of the assays of lead and silver. I sold out my interest to Mr. Rutter and left Wardner some time in 1887.

Cross-examination:

We located the Edith claim some time in June, and located the Kirby claim over it; I don't remember just how long after. Do not remember whether the Edith was recorded before we located the Kirby or not, or whether we had staked the Edith.

The witness was shown the location notice of the Edith claim by Mr. Heyburn, and after examining same testified that the claim described in it was the claim he and his partners located.

I do not know whether the discovery point of the Kirby was in-
side of the Edith lines. I found more ground there, and
147 located another claim right over it. It was all our property anyhow, so we located over it, right over the top of the Edith. The location of the Edith was completed before the Kirby was located. The discoveries of the Edith and Kirby were close together. I intended to hold both the Edith and Kirby locations. Had the same character of discovery on the Edith as we had on the Kirby—just the same—and was marked with six stakes, the same as the Kirby. I don't remember where we had the notice posted on the Edith. if I remember correctly, the notice was posted about the same place for both claims, close together.

At this time the location notice of the Edith claim was offered and received in evidence over the objection of Mr. McBride, counsel for the plaintiffs, and marked Defendant's Exhibit No. I, to which an exception is allowed, and is as follows:

DEFENDANT'S EXHIBIT NO. I.

Notice of Location of Quartz Claim.

Notice is hereby given to all whom it may concern that we, James Day, Jacob Johns, Elar Charlebois, and Ed. Sullivan, citizens of the United States, over the age of twenty-one years, having discovered a vein or lode of quartz or rock in place, bearing mineral, within the limits of the claim hereby located, have this day, under and in

accordance with the Revised Statutes of the United States,
148 chapter six, title thirty-two, located (1,200) twelve hundred linear feet of this vein or lode, with surface ground five hundred (500) feet in width, situated in Yreka mining district, county of Shoshone, and known as the Edith quartz mining claim, and extending 1,000 feet westerly and 200 easterly from this notice at the discovery or prospect shaft, which is 200 feet from the east end line, the exterior boundaries of this claim being distinctly marked by reference to some natural objects or permanent monuments, and more particularly described as follows, to wit: Commencing at the northeast corner, and running in a westerly direction 1,200 feet to a post at the northwest corner; thence south 250 feet to west end center post; thence south to the southeast corner post 250 feet; thence east 1,200 feet to the southeast corner; thence north 250 to the east end post; thence north 250 feet to a post at the northeast corner or place of beginning, bounded on the east by the Emma, on the west by the Boss lode, on the north by the Last Chance and Tyler lodes, and intend to hold and work said claim as provided by the local customs and rules of miners and mining statutes of the United States and Idaho Territory.

Located this 10th day of June, 1886.

Recorded June 15, 1886.

JAMES DAY.
JACOB JOHNS.
ELAR CHARLEBOIS.
ED. SULLIVAN.

149 Redirect examination:

Our object in locating the Kirby over the Edith was, that we found, after locating the Edith, we had ground to spare, and, in order to cover it, located the Kirby. The same parties that located the Kirby located the Edith. I had the Edith location recorded. There was about the same amount of discovery work done on the Edith as on the Kirby.

Thereupon FRANK C. LORING was called on behalf of plaintiff, and testified:

I reside at Spokane, Washington. Am mining engineer and miner. I resided in Shoshone county, Idaho, between 1886 and 1893. I am familiar with the Yreka mining district, also with the country around the Bunker Hill ledge. I know the location called the Kirby. I first saw it in the summer of 1889, when I was called upon to survey it. I went upon the ground on August 1, 1889, and identified the claim. The claim lies easterly and westerly. At the west end I found three stumps, marked as follows: At the southwest corner a fir stump 5 inches square and 6 feet high, marked "Southwest corner post of the Kirby lode, located July 11, 1886." At the west end center I found a fir stump 6 by 6 inches, 6 feet high, marked "West center end stake of"—that is all I could see.

At the northwest corner I found a fir stump 4 inches square
150 and 6 feet high, marked "Northwest corner Kirby lode;" and at the east end at the southwest corner I found a post 5

by 4 inches, 5 feet high, marked "Southeast corner Kirby fraction, located July 11, 1886." It was leaning against a stump 12 feet high. Then I found the northeast corner, which was a post. I could not find the east end center. I then went to the tunnel, which was pointed out to me as the discovery of the Kirby lode; don't remember whether the notice was up or not, but a man by the name of Sullivan showed it to me. I surveyed the claim and established the patent corners. The patent corners as established are identical, except the southwest corner, which was drawn in, as near as I can recollect, about 300 feet; in other words, I paralleled the east end line and conformed to the west end line. In order to do so I had to draw in the southwest corner; that is all I did; took some bearing objects.

Answering the question, "Do you recollect the width of the claim at the southwest end?" Mr. Loring said: "I did not come prepared with my map, but it was roughly 600 feet; I think less than that. My end lines, as I located them, were 460 feet long, and I located the southwest corner as near the original side lines as I could with careful calculation. At the east end the distance between the two corners was also 460 feet. The south side line of the Last Chance claim was south of the northeast corner of the Kirby claim. I cannot recollect the length of the west end line of the Kirby, whether it was 600 feet or less, because I surveyed in a very roundabout way.

The length of the claim, as I surveyed it, was 780 feet. That
151 was the distance between the northeast and northwest corners; on the south line it was about 1,100 feet. That was the reason I drew the corner in. I saw a tunnel at the discovery point in July; saw the work that had been done in 1889; saw a tunnel 169 feet long the latter part of July. About 20 feet from the mouth of the tunnel I saw small seams of iron oxide and quartz, and at the mouth of the tunnel and over the tunnel was a mass of iron-stained broken-up material. These small seams, perhaps an inch or two, or possibly 3 inches wide—there may have been four or five of them—were very flat, and continued into the tunnel perhaps a distance of 20 or 30 feet from the point where they began. Further in the tunnel was another streak which since then has been sunk on. I saw an incline shaft on it last year, on the vein. That is all I noticed in the tunnel. The streaks mentioned were streaks of quartz, containing oxide of iron and small clay seams with iron through them, and, as near as I could judge, small quantities of carbonate of lead. I have been mining nearly all my life, and in my opinion the indications in that ground were such as a miner would follow with the expectation of finding ore. I don't think the location notice was there at the time. The place where it had been posted was pointed out to me by Mr. Sullivan. I don't recollect especially about the vein, only that it was a well-defined streak of quartz and vein material. I was in the tunnel in 1891 or 1892; remember that an incline shaft had been sunk near

the face on a streak of ore. It was a mineral vein such as a
152 miner would regard as proper to follow. I went on the ground once after that to point out the stakes which I had

located, in company with Mr. Bradley and others. I have never seen the survey for patent. Have been engaged in mining and examining mines more or less since I was 15 years of age, and have had 20 years' experience. The general character of the surface of that claim and the surrounding ore is an outcrop of iron and quartz and quartzite, impregnated with iron. The entire country has more or less iron stains in it, but there is a distinction between that and the actual vein outcrop. There were indications of a vein in the tunnel. There was so much surface dirt that there was nothing solid at the surface to indicate it, with a lot of broken-up material, which had more or less iron in it. The surface was covered with considerable dirt and loose rock. When I went on the ground to make the survey I satisfied myself that it was mineral ground. The outcrop above the tunnel is a mass of broken-up material, which is somewhat different from the ordinary country; that is, it has more iron in it, more stained iron; would indicate probably that on the ground was vein formation. There is a general indication of a vein there. The work in the tunnel and the disturbing of the surface at the mouth of the tunnel show that there is a mineral vein there or streaks, three or four streaks or small veins—small streaks of vein material. I never had any assays made or saw any from that ground. There were some small pits near the mouth of that tunnel which I did not examine. I stated yesterday that the north-
153 west corner of the official survey and the original corner were identical, but they were not. I was mistaken in that. I ran down the west end line of the original claim 130 feet; placed my official corner there instead of at the original northwest corner; from there I ran west end line parallel to the east end line, which was as the original east end line. I also stated yesterday that the original northwest corner and the official corner were the same, which was not correct. The south side line of my survey and the south side line of the original location were practically identical, as near as I could tell.

Cross-examination:

I have a blue-print plat with me showing my official survey. I was mistaken in the details as to corners and lines. There was no mistake as far as the survey was concerned. Mr. Sullivan pointed out the lines to me. I drew in the north side line. I placed permanent monuments at the corners, as in official surveys; was assisted by Washburn and Bell. Bell is now dead. Mr. Spaulding was in possession of the mine at the time, and employed me to make the survey. I delivered my field-notes to Mr. Clayton Miller and also to Mr. Rutter. Mr. Rutter and Mr. Bradley came to my office some time ago and retained me in this case. I gave them my notes. Mr. Spaulding afterwards came to my office and asked me for my notes, and I refused to give them to him. He tendered me $100 for them. Mr. Rutter had nothing to do with the original employment.
154 The last time I was on the ground I saw three of the original posts, which I placed on the ground when I made the official

survey. They were the northwest corner, the northeast corner, and the southeast corner; the southwest corner was not there. I don't know whether it was there or not. I did not complete the survey of the claim because I had not been paid. I have a sketch or tracing, but not original plat; I have not seen it since about two years ago, and do not know where it is. My field-notes do not show where I established the lode line in that survey. I determined the lode line by the position of the center end stakes. I do not prospect for the lode line as it passes through the end of the claim, but always indicate it as passing through the discovery. All surveyors and deputy surveyors are required to indicate the lode line, and in this case the lode line would necessarily pass through the discovery point. The discovery point is the only fixed point on the lode line. In practice, a surveyor fits the course of his lode line, after passing through the discovery, to suit his corners. I fixed the discovery (pointing to the map) at the mouth of that tunnel. In my notes I merely referred to it as a discovery tunnel. I placed a post 4 by 4 inches, 6 feet high, on the south line, where I drew in southwest corner, marked it "2771," but put no name or writing on it. I placed nothing at the discovery point. I placed a post at each of the other corners indicated by that resurvey and marked them with the number of the survey. In my notes I have indicated that the discovery was at the mouth of that tunnel. (Reading the notes, witness says:) I say here, "Begin-
155 ning at the face of discovery tunnel," then I ran out the tunnel, giving the course and distance to the mouth of the tunnel: "Thence north one degree west." I mean beginning at the face and then running out of the tunnel. I began at the south end of the tunnel. "Thence north one degree west through course 83½ feet; thence north 65 degrees east, 22.3 feet; thence north 82 degrees east, 16 feet; thence north 17 degrees east, 47 feet to mouth of tunnel." (Reading his notes of survey further as to what occurred next witness says:) Over a point in front of tunnel, foresight on on northeast corner, needle north one degree east. Last station in tunnel bears reverse right 16 degrees 35 minutes, needle south 17 degrees west, 58 feet. Tree on hill bears left 74 degrees 35 minutes. I went up the hill and measured up to the tree, and then to this corner. "Bears left 74 degrees 34 minutes. Elevation on hill at tunnel 38 degrees. Corner 2, survey 550, bears reverse left 86 degrees 23 minutes."

Then I have here some notes regarding the location notice. (Witness reads:) Kirby Fraction lode located July 11, '86, by James Day, Ed. Sullivan, Jacob Johns, E. Charlebois; claim 1,400 feet long, 400 feet wide, 1,250 feet westerly.

Then follows a partial description of the claim up to a point where counsel for defendant said to witness that would do for that.

At this time witness, examining a certain paper purporting to be a plat of the claim, admits that he gave the same to Mr.
156 Spaulding after making the survey, and then said: I made this plat most undoubtedly, but I don't think I put all on the plat that is now on it, mentioning the item of topography. It

may be that I put it on, but I don't remember. I have read all the notes I made with reference to the discovery point.

Examining the discovery point on the map witness says: I see where it is. In answer to the question, "How far is that from the mouth of the tunnel according to the sketch on the map?" answered 130 feet. Continuing he says: "The discovery on that map I marked 130 feet; that is the discovery marked on the map, yes. I have no recollection of finding anything at that point; I have no notes of anything there. I made the plat after the survey, but don't remember how long after. Mr. Sullivan told me the discovery was at the mouth of that tunnel, so I called the tunnel 'discovery tunnel.' When I speak of finding a discovery there I speak from memory."

At this time the plat in question was offered in evidence, objected to as immaterial, overruled, and marked Defendant's Exhibit No. 2, and the plaintiffs allowed an exception.

There is nothing in my notes about the discovery, except the expression "over a point in front of tunnel." I have no memorandum as to what the discovery consisted in or where it was located, except that this is marked "discovery tunnel." In speaking of the discovery, I mean by "ore," material carrying gold, silver, copper, or any other of the precious metals. This particular rock car-
157 ried iron and lead. I know this from experience purely, judging from the eye alone; it was brown and black and reddish brown, caused from oxidization of the iron. There was a small quantity of quartz there, having a yellow stain, which was carbonate of lead, in my opinion. I have not the slightest idea as to how much lead was in it. In answer to a question, much or little, witness said: I don't know; I have no knowledge as to its having any value. I do not know as regards the precious metal value of that ore; I have never assayed any of it; don't know that it carried precious metal. The streaks running across the tunnel of which I spoke before were from a half to two inches wide. As nearly as I can recollect, there were four or five of them; I did not measure them. I only knew that there were indications of a vein there. There were small veins there, undoubtedly. In my opinion, those small veins were feeders for more important veins, possibly, in the hill. I don't know how much quartz there was there. I am somewhat familiar with the ores that are worked and considered valuable in that vicinity. The streaks that I mentioned were about 130 feet from the point indicated as the discovery point. I saw no streaks of ore at any point nearer then that to the discovery. The streaks were dipping southerly, at an angle of about 60 degrees from the perpendicular; it may have been seventy, it may have been 50. I do not know whether they were all pitching at the same angle. There was no work done on the streaks; they went right on past the streaks, without doing any work on them.
158 I did not find any ledge where I began my survey; I did not look for any. I went in and tried to make my survey as soon as possible to get out of the tunnel. I had no object in looking for anything. There might have been 20 feet of ore there

and I would not have seen it. I had my survey to make, and my discovery was at the mouth of the tunnel. I was told by Mr. Sullivan that the discovery was at the mouth of the tunnel, and therefore I said "discovery tunnel." Sullivan told me about the discovery as he was climbing around the mountain, and described it in such a way that I understood that it was the mouth of the tunnel.

In answer to a suggestion by the court if there was a discrepancy of 130 feet between the point marked "discovery point" at the mouth of the tunnel and the marking on the small map, witness explains that his field-notes show nothing except the discovery tunnel, but adds: I did put these letters "disc." on there; that is, on the small map; I don't know how or why; it was undoubtedly a mistake, or it may be Mr. Spaulding had me put that on for some other reason. So far as my field-notes are concerned; there is nothing in that point.

At this point Mr. Heyburn, counsel for the defendant, asked that the field-notes be put in evidence.

The witness continued: At the point 130 feet distant from the mouth of the tunnel which is marked as discovery tunnel, I have no recollection of there being any work done, or of there being any ore or indication of ore.

Thereupon ROYAL J. RUTTER was called on behalf of plaintiffs and testified:

159 The first time I went over the ground was with James Day for purpose of examining the boundaries. I was at that time negotiating for the purchase of the property, and Mr. Day went with me to show me the stakes. As we were going up the hill he (Mr. Day) showed me those bottom stakes. I asked what stake that was. He said: "That is one of the Edith." He took up the stake. I asked what became of the others. He said he used them in marking the Kirby. The boundaries of the Kirby were shown to me at that time. The testimony of Mr. Rutter with reference to what Mr. Day told him was objected to by Mr. Heyburn, counsel for the defendant, on the ground that Mr. Day was dead, and all of the testimony of Mr. Rutter regarding this conversation with Mr. Day upon the subject of the boundaries of the claim went in under the objection, and exception allowed.

The witness continued: Mr. Day tore the Edith stakes out of the ground, said it was one of the Edith stakes. He said he used the other stakes and marked them over for the Kirby—said the east end stakes of the Edith had been used for the Kirby.

All of the testimony of Mr. Rutter as to what Mr. Day said about the Edith claim was objected to by Mr. Heyburn, counsel for the defendant, as immaterial and incompetent. Whereupon Mr. McBride, counsel for the plaintiffs, stated that he wished to show that the parties intended to abandon the Edith claim. The objection of defendant was overruled and exceptions allowed the defendant, and Mr. Rutter proceeded to testify as follows:

160 He (Mr. Day) was going over the ground. He showed me the stakes. As he was going up the hill he ran across this old

stake; said it was an Edith stake, pulled it up, said: "This is the Kirby ground now." Told me they made a new location, and called it the Kirby. In working the ground afterward we called it the Kirby. I know what the boundaries of the Kirby were. I was an owner in the mine in 1888, and did work on the claim that year.

At this time plaintiffs' counsel offered in evidence a receipt from men who did the assessment-work on the Kirby claim for the year 1888, which receipt was received in evidence and marked Plaintiffs' Exhibit "G," and is as follows:

PLAINTIFFS' EXHIBIT "G."

$100. WARDNER JUNCTION, *Dec.* 28, 1883.

Rec. of Rutter and Sullivan one hundred dollars for assessment for work done on Kirby mine.

J. E. RUNNEL.

Thereupon plaintiffs' counsel offered in evidence a second receipt for assessment-work for the year 1887, which was received and marked Plaintiffs' Exhibit "H," and is as follows:

PLAINTIFFS' EXHIBIT "H."

$100. WARDNER JUNCTION, IDAHO, *Dec.* 26, 1887.

Received from R. J. Rutter $100.00 (one hundred dollars) for work done on the Kirby mine.

THEODORE FAUST.
JAMES WYATT.

161 Whereupon plaintiffs' counsel offered in evidence a receipt for money paid for assessment-work done for the year 1888, which was received and marked Plaintiffs' Exhibit "I," and is as follows:

PLAINTIFFS' EXHIBIT "I."

KELLOGG, *Oct. 30th*, 1892.

Received of R. J. Rutter one hundred dollars for assessment-work done on Kirby mining claim.

(JOSIAH) JONAH HILL.

The receipts for assessment-work done in 1886 and 1887 were objected to by counsel for defendant on the ground that they were immaterial, as no assessment-work was required to be done in those years.

Mr. Rutter testified that one hundred dollars' worth of work had been done for the year 1886, also for 1887 and 1888.

Thereupon counsel for plaintiffs offered in evidence notice of intention to hold and work mining claim in question for the year 1893, which was received and marked Plaintiffs' Exhibit "J," and is as follows:

PLAINTIFFS' EXHIBIT "J."

Notice of Intention to Hold and Work Mining Claim.

Notice is hereby given that the undersigned, one of the owners of the "Kirby" mining claim, situated in Yreka mining district, Shoshone county, State of Idaho, being desirous of taking the benefit of the act of Congress entitled "An act to amend section 2324 of the Revised Statutes of the United States, relating to mining
162 claims," approved November, —, 1893, hereby declares that I, in good faith, intend to hold and work such claim.

Witness my hand this 18th day of November, 1893.

ROYAL J. RUTTER.

Subscribed and sworn to before me this 13th day of November, 1893.

[SEAL.] A. E. ANGEL,
Notary Public.

Recorded November 27th, 1893.

Counsel for plaintiffs also offered in evidence notice of intention to hold and work mining claim for 1894, to which the defendant's counsel objected, reserving the right to move to strike it out at a later stage of the case, which objection was overruled, and the paper was received in evidence, marked Exhibit "K," and is as follows:

PLAINTIFFS' EXHIBIT "K."

Notice of Intention to Hold and Work Mining Claim.

Notice is hereby given that the undersigned owner of the Kirby mine, located in Yreka mining district, Shoshone Co., Idaho, claim, situated in Yreka mining district, Shoshone county, State of Idaho, being desirous of taking the benefit of the act of Congress entitled "An act to amend section 2324 of the Revised Statutes of the United States relating to mining claims," approved July 18, 1894, hereby declare that I, in good faith, intend to hold and work said mining claim.

163 Witness our hand this fifth day of November, A. D. 1894.

ROYAL J. RUTTER.

Recorded November 5th, 1894.

Counsel for plaintiffs then offered in evidence certificate of proof of labor for 1895, which was objected to by counsel for the defendant, on the ground that it was simply a statement that the labor was performed, and not proof of labor, and the court reserved judgment on the objection.

Thereupon the question was asked the witness if he did any work on the claim in 1895, to which question defendant's counsel objected, on the ground that Mr. Rutter had no knowledge of the

claim in 1895, and that what he did in 1895 would not in any way affect the validity of the location, as he had no title to the claim in 1895, which objection was overruled and the defendant allowed an exception.

Whereupon the witness answered the question saying: Mr. Bradley and I had the work done. We ran a drift off from the tunnel of 22 feet, commencing at a point within about 50 feet from the mouth of the tunnel. We ran the drift on what I consider the vein. The value of the work done was $100 or more; it may have been $115. Mr. Bradley was interested with me in the mine at that time, and we have done work since then. We did work in 1896—$100 worth.

At this time counsel for plaintiffs offered in evidence a cer-
164 tificate or proof of labor for the year 1895 to which counsel for defendant objected on the ground of its immateriality, the work being done after the commencement of the suit. The objection was overruled, defendant allowed an exception, and the paper admitted and marked Plaintiffs' Exhibit "L," and is as follows:

PLAINTIFF'S EXHIBIT "L."

Proof of Annual Assessment.

COUNTY OF SHOSHONE, } ss:
State of Idaho, }

Before me, the subscribed, personally appeared Royal J. Rutter, who being first duly sworn says that at least one hundred dollars' worth of work or improvements was performed or made upon the Kirby mining claim, situated in Yreka mining district, county of Shoshone, State of Idaho; that such expenditure was made by Royal J. Rutter and other owners of said claim, for the purpose of holding the same.

ROYAL J. RUTTER.

Subscribed and sworn to before me this 9th day of December, 1895.

[SEAL.] H. J. SINCLAIR,
Notary Public.

Recorded December 11, 1895.

The witness continued: "We did work in the year 1896 which was worth $100; did it in the tunnel about 40 or 50 feet from the mouth of the tunnel running east. The drift was on what I consider the vein.

165 The witness further testified: I have been familiar with the stakes that were shown me as surface boundaries from the time they were first shown me to the present, and know that which is now embraced within our protest survey, for which we have made application for patent, is within the surface boundaries as shown me by Sullivan.

To which evidence objection was made by counsel for the defendant as incompetent; which objection was overruled, and the defendant allowed an exception.

Cross-examination:

Mr. Bradley is my partner. I paid for the assessment-work in 1895. I got the money from Mr. Bradley.

At this time counsel for defendant offered in evidence a declaration of work performed on the Kirby claim by the Bunker Hill & Sullivan Mining Company, sworn to by Mr. Bradley, for the year 1895 (see 4 exhibits, p. 97), to which offer objection was made by counsel for plaintiffs, and upon which offer the court stated that he reserved his ruling and would perhaps admit the paper at a later stage of the case; to which decision Mr. Heyburn, counsel for defendant, objected, and the objection was overruled and an exception allowed.

Mr. Rutter then proceeded to testify under cross-examination: I saw the Kirby location notice the first time I was there, before I bought an interest. It was on a snag or tree or stump, what-
166 ever you call it, about 20 feet from the face of the tunnel. They were working there on an open cut. I think it was in 1886. I think it was in the fall or in the middle of the summer, I won't say exactly. I had no interest in the claim and nothing to impress it on my mind. I don't like to fix an exact time, because I don't remember any exact time. The next time I was on the ground they went to show me over the ground and were talking about selling me an interest. I believe it was in 1887, either in April or May. They were not working on the tunnel at that time. I think they had done some work since I was there before, but I don't know how much. They had lagged the cut overhead, got in some timbers, I think three or four sets, and should judge they were in about 20 feet. Did not look at the stakes in 1886; first saw them in 1887, a few days before I bought an interest. I can't remember exactly when. They showed me the stakes in 1887. A man by the name of Goff, I think, had the deeds drawn to me. I don't know who directed them to be drawn; don't remember whether I paid for them. I was present when they were drawn. I suppose they were read to me. I knew the contents of them. I don't remember whether I gave direction as to the description of the property. The other parties to the deed were present when they were drawn I suppose, and signed their names; they must have been present.

In answer to the further question, What is your recollection of the fact? Mr. Rutter answered: They were (present), yes. I
167 was aware that two mining claims were conveyed to me by the deeds, one called Edith and one called Kirby. I suppose my attention was called to this fact at the time. Also, in the deed made by Mr. Day, on June 1, 1887, two claims are described as the Edith and Kirby. My attention was also called to this.

Speaking of excavations, witness says: There were no other excavations about the notice at the time.

The witness being asked further to refresh his memory with reference to the time of year that he was on the ground in 1886, said: I can't fix the time. Twelve years is a long time. Having no interest in the claim at the time, cannot remember. The open cut at that time was, I should judge, in loose ground; did not pay much attention to it. Saw the notice at that time; did not read it, never read it that I remember of. We found the first stake of the Edith when we went up the hill quite away above the discovery—won't say how far it was. I suppose it was the northwest corner. Mr. Day told me it was the Edith stake: I did not look at it.

In answer to a question as to who paid the assessment-work for 1895, Mr. Rutter testified: I paid it. In answer to the further question whether or not the Bunker Hill & Sullivan Mining Company did not pay it, Mr. Rutter testified that: "The money comes out of me; that was the agreement Mr. Bradley and I has got."

Whereupon counsel for plaintiffs objected to further questioning on this point, on the ground of immateriality and defendant's counsel renewed his offer to prove that neither Mr. Rutter nor
68 Mr. Bradley had any interest in the property, and that if the Bunker Hill & Sullivan Company were the real parties, they alone could maintain the action, which offer was objected to. Objection sustained, and an exception was allowed defendant.

Witness further testified: I did no work on the claim personally for 1892, 1893, or 1894. Mr. Hill did the work for 1892—did the work in the face of the tunnel. The tunnel at that time was in between 40 and 50 feet, I should judge. I think Mr. Hill ran in 18, or 20 feet. There was one hundred dollars' worth of work done, judged by the number of feet run in the tunnel. I was to give them $100 to go up there and do so much work. I think they ran 18 feet. That was in 1892. The work was timbered. It was a good-size tunnel.

Thereupon JOHN L. SMITH was called on behalf of plaintiffs and testified:

I reside at Wardner, Idaho. First went to that camp in 1895. First saw the ground in question about the middle of September, 1885. Was there in 1886. I know the condition of that ground as it was in 1886. Know where the location called the Kirby was made. Know Ed. Sullivan. I know within a few weeks of the time when the Kirby was located. The ground had never been located until Ed. Sullivan went on the ground. I directed Ed. Sullivan's attention to that ground.

This last answer and the question which prompted it were
69 objected to as immaterial by counsel for defendant, which objection was overruled, and the defendant allowed an exception.

The witness continued: That was about the last of June, 1886; can't say whether it was before or after the location.

The question: What do you know about the ground as being

mineral ground? was objected to as incompetent and immaterial, as not tending to show the discovery of any ledge by the locators, which objection was overruled, and an exception allowed defendant.

The witness answered: I pointed this ground out about the last of June to Mr. Sullivan, and when I came on the ground, about the last of July, they had a big open cut in there 7 or 8 feet wide, 15 or 20 feet long, 10 or 12 feet deep, run in solid formation which was quartz. In that quartz they had iron ore and white quartz in place in solid rock, pointed out to me as the place of discovery. I saw the sign of ore and quartz; it was in little stringers and bunches both.

To the question whether witness had seen indications of the vein before the location, objection was made by defendant's counsel, which objection was overruled, and the defendant allowed an exception.

The witness answered: There is plenty of indication of mineral; I don't know as I saw any mineral; don't know as I examined it for mineral.

In answer to the question: What do you call indications? the witness said: Iron stain mixed in white quartz.

Whereupon the following proceedings were had:

170 Q. I will ask you whether those indications were or were not the same upon which other locations were made in the same vicinity?

Mr. HEYBURN: I object to that as incompetent and immaterial; incompetent, because the question is whether or not the ledge was discovered on this claim, and not what existed upon other mining claims.

The COURT: I think that that testimony is proper and relevant. I understand, although I have never seen the country, that you have through there a great ledge or outcropping of what proves to be a ledge, and that it seems to be a recognized rule there that a location upon that is valid, and that many of the claims are located in that way. I will allow this testimony for the purpose of showing what has been done in that country, and the manner of locations, and kind of material upon which they located.

Objection overruled. Exception.

A. Do you mean what I saw there, or what they showed me in this cut?

Q. What you saw there on the surface?

A. Well, there was indications of mineral, the same as nearly all the veins had; some had ore, some had—all had the same indications?

Q. At the cut, this one you went over after the work was done, what did you see there in the way of mineral or vein?

171 Mr. HEYBURN: I object, unless it is shown to be before the location.

Objection overruled. Exception.

To the question: What did you see at the cut as to indications of

mineral? objection was made, unless it were shown to be before the location, which objection was overruled, and an exception allowed defendant.

The witness answered: "I saw iron and quartz in place." The indications were such that a miner would follow in that camp. I am speaking of what I saw the middle or last of July. After they had this cut running, the indications were good; looked favorable before that; looked quite like it might be a lead. They seemed well pleased—seemed to be satisfied. I attracted Sullivan's attention to it. I was acquainted with him; he was a friend of mine; wanted to know if I knew of any ground that had not been located, and I pointed it out to him. I went on the ground first the 2d of September, 1895. I never examined the ground for other indications than those mentioned. There was indications of mineral nearly all around there. I never examined that claim for mineral except at the point. I saw a location notice when I was on that ground on a tree near the cut; noticed it ran easterly and westerly. It was a location notice of the Kirby claim. Never saw any other notice there. Have seen the three east end stakes of the Kirby claim, and one or two maybe on the west. I merely glanced at the notice, and knew it ran east and west. I was interested in
172 ground east; looked at the notice to see whether this conflicted with it. Don't know whether Sullivan was native-born or a foreigner.

Thereupon JOSIAH HILL was called on behalf of plaintiffs and testified:

My name is Josiah Hill; live at Wardner, Idaho; I am in the hotel business; have not mined to any extent; been in Wardner about twelve years; am familiar with the surrounding country. Have been up to the Kirby claim and done some work there. It was in the year 1892. I did it for Mr. Rutter and myself. I became interested in the claim by doing his assessment-work. I did about 20 feet of tunnel.

In answer to the question: What was the work that you did there worth? objection was made as not expressing the proper measure of value, which objection was overruled, and an exception was allowed defendant. The witness answered:

It was worth $100. Have noticed the indications of ore at the mouth of the tunnel. Have observed indications of ores about mines sufficient to know ore from country rock. I saw some seams in the tunnel there carrying ore. There was iron and clay; looked as though it might be carrying lead and silver; never had an assay made. I think the tunnel was in about 140 or 150 feet when I completed the work in 1892. In running the tunnel I drove in on solid rock, a good deal the same character of rock that is in that country—hard quartzite.

173 Cross-examination:

A man by the name of Raspberry and my son did the work in 1892. My son was about 17 years old in 1892; he was born in

1873; worked 14½ days. There was no work done by anybody, except my son and Raspberry that year. I paid my son the same as I did Raspberry, $3.50 a day.

Thereupon R. J. RUTTER was recalled on behalf of plaintiffs and testified, in making correction in his testimony, already given:

At the time I went up to employ Mr. Sullivan they were working in the open cut. He called my attention to his notice. To the best of my opinion I did not read it. In the following spring I was on the ground and read the Kirby notice.

In answer to the question: You were made to say last Saturday evening that you never read the notice of discovery? the witness answered: Well, I did. I have read the notice, the Kirby notice. I did not read the notice that was pointed out to me the first time, but read it the following spring.

Whereupon FRANK C. LORING was recalled on behalf of plaintiffs for further cross-examination:

Being asked to give the course and distance from the mouth of the tunnel to some point in the surface boundaries, the witness gave a general statement of the method of his survey.

174 Thereupon J. M. PORTER was called on behalf of plaintiffs and testified:

I reside in Wallace, Idaho. Am a surveyor and miner. Resided in Wallace since the spring of 1890. Have been doing the work of a surveyor and civil engineer since that time. Am familiar with the ground in dispute, both the Kirby and Shoshone. Have made a diagram of them.

Witness produced diagram, which was marked Map "A."

I made that map from actual surveys and official notes. I surveyed the Kirby mine and the Shoshone. I made the survey for the Kirby September 19, 1895. The extreme boundaries of the Kirby claim as staked on the ground are shown by a heavy black mark. The line shaded with red is the official survey within the lines of the location. On the ground I found a corner, a post, at the southwest corner of the claim, identified by Mr. Loring as the location corner and official corner established by him in July 22, 1889. It was the northwest corner of the Kirby, and also marked 4–771. Found that post leaning against a stub. It was a post 6 by 6 inches, 5½ feet high, marked 4–771 official corner. The corner was also identified by Mr. Rutter and Mr. Smith as being the southeast corner of the claim. The next corner we found was the northeast corner, marked 1–771, the post 4 by 5 inches, 4½ feet high. From that corner we went to the discovery tunnel. Exactly over the mouth of that tunnel there are a few sets of timbers. At a point 15 feet from the mouth of the tunnel there is a streak of ore.

175 In answer to a suggeston of plaintiff's counsel: I want to get around to the boundaries of the claim before you come to the discovery tunnel, witness said: The next is the northwest cor-

ner, marked 2 in this plat. It is used as an official corner. Northwest corner location of the Kirby, located July 11, 1886, fir stump 4 by 4 inches, 5½ feet high. From that point to the location end center of the Kirby. It is a fir stump 6 by 6 inches, 6 feet high, marked west end center stake of—then there is something more on there I could not make out, a cipher. From there we went to the southwest location corner, fir stump 4 by 4 inches, 5 feet high, marked southwest corner of the Kirby lode, located July 11—something else that I could not make out. From there extended a line to the southeast corner, as that line is shown, heavy dark line. I drew in the northeast corner of the Kirby where it conflicted with the Last Chance line, 116.1 feet, I think, from the location. I established a post at that corner, which is directly on a line with the Last Chance marked corner No. 1 official survey. From that point I ran to the northwest corner, which is corner 2, which is the location corner. I set a post alongside of this same stump; thence ran south and established the center end at the mouth of this discovery tunnel, and on to the southwest corner, the location corner, set a post beside that stump, marked 3–771; thence run a little north of east to corner No. 4 of the official survey; thence northerly to corner No. 1. This corner is something like 317 feet from the location point and directly on the line.

176 In answer to question: Is there anything there showing the conflict between the Shoshone and Kirby? the witness answered: The Shoshone is indicated by the line shaded blue, while the Kirby line is shaded red. There is some conflict there on the Kirby.

Speaking of a discovery, witness said: As you pass into the tunnel about 12 feet from the mouth there is a rock in place, mineral rock, there showing a heavy iron stain. At a point 75 feet from the mouth there is a streak of clay and iron stain, iron quartzite, iron and a little quartzite, iron and a little quartz and ledge matter, about 2 inches wide and tolerably flat, pitching into the hill, pitching southerly, southwesterly. At a point 45 feet from the mouth there is a larger streak 6 inches, showing clay and oxide of iron, and in both of these streaks there is a yellowish color, probably carbonate of lead. This is on the ridge between Milo and Deadwood gulch. The ridge runs a little east of north. This cut marked No. 10 black, and No. 11 and 13 black, they are on the ridge; the strike of the ridge sloping a little to the north as you run down the ridge, but more to the northeast. They are standing up along near the Stemwinder about this corner of the location of the Kirby, and next comes a sag or swale, down which snowslides frequently run covering that portion up with sliding rock, dirt and brush growing up there. Near this corner there is an outcrop or rock in place, rather rough and uneven, covered over with soil and earth, brush, etc. It has

177 been timbered at one time. The hill slopes northeasterly. It is a steep hill, very steep and quite rugged. At a point 80 or 90 feet from the mouth of the tunnel there is a ledge that is drifted on about 20 feet easterly from the tunnel. At this point there is a drift on the vein about 20 or 24 feet easterly from this tunnel and

about 23 feet westerly. That is on a vein 3 feet wide, filled with mineralized matter, quartz and iron, some lead stain s' wing—quite a good-looking showing—an indication that is followed all over the country. Quite a large vein stands at an angle of about 70 degrees, dipping southerly. Taking the angle of the dip of the first streak described, it would come out about the mouth of the tunnel. The next streak, which is 45 feet from the mouth of the tunnel, probably came out half way between where it is located in the bottom of the tunnel and the mouth. This one is a little steeper than the first. At the face of the tunnel, about 80 feet from this ledge in the drifts, there is a winze 50 feet in depth; that is, following down the wall on a small streak, just a small one, showing this mineralized matter. From the bottom of that there is a drift 37½ feet, which is running a little north of east. This is shown on the map. This is on a small streak of about 2 inches, showing little lead and this iron. There is a little galena shown in that. The tunnel is 192 feet in length. There is a winze 48 feet, a drift of 37 feet from the bottom of the winze; two drifts on the vein 46 feet. That is what is called the big vein. It crosses
178 the tunnel, or the tunnel crosses it. I am familiar with the mines in that part of the country to some extent, a great extent. I have been doing a good deal of surveying in the Bunker Hill mine, a good deal in the Tyler; have been at the discovery points of those mines. Have seen the discovery point of the Emma and the Last Chance and the Tyler. The Kirby is similar to these the discovery of mineralized quartz.

In answer to a suggestion by Mr. Heyburn, asking witness if he means the discovery of the Last Chance, Tyler, Emma, and Stemwinder, witness says: Yes. I am not real sure of the point of the Stemwinder, but as it was pointed out to me, as about the point of discovery.

In answer to a question: What are the general surface indications in that vicinity? witness answers: The iron-stained quartzite with a little quartz mixed in; sometimes they find a little lead in it, but very often made of the iron stains, and quartzite impregnated with iron. From my knowledge of the practice in that community from observation, the indications are such as a miner would follow with the expectation of finding ore. I have recently visited that ground with a view of examining that point. I visited it on May 17th; think I have been there since that time. Mr. Johns was with me on May 17th. He pointed out the point which they claimed as a discovery point. I examined it, and my statement as to the sufficiency of the discovery was with reference to that point, the point mentioned on that occasion.

179 Cross-examination by Mr. HEYBURN:

When I spoke of the point of discovery, I meant the point just under cover in the tunnel. Johns did not tell me the result of the assay; said they got a trace. He did not tell me when they struck the solid rock; that is not the date. I made the official survey of

the claim for patent at the same time that I made the survey for adverse. I made but the one patent survey, which has been approved.

In answer to the question: Approved from the plat that you furnished? witness said: Well, the first plat I sent in, in making my connections with this Shoshone survey, I connected with three corners, I think No. 1, northeast corner, No. 7, southeast corner, and No. 6, which was on the south side, and no two of them agreed, so I run down the line of the Shoshone, platted it just as I found it on the ground, and sent my plat in showing the conflict just as I found it. That plat was returned to me, stating that there was such a discrepancy there between the plat of the ground as I showed it and the official notes as filed in the office of the surveyor general, that they could not approve it in that shape. The official notes were of the Shoshone; that there would have to be a joint survey made—a correction made. But the lines of the Kirby are exactly as shown in that plat, and were at the time. There was a correction made of the plat; I made it; the correction was made some
180 little time later; I don't remember the date; it was after I filed the adverse survey.

In answer to the question: That is not correct, showing the boundaries of the Shoshone, is it? the witness answered: That is correct as I found the stakes on the ground; yes, sir. I don't think they have been moved.

At this point Mr. Heyburn passed to court plat made by Mr. Porter and certified to by the surveyor general showing that the survey is not as Mr. Porter had put it on his map, and in answer to the question: Why did you bring this map into court with these lines on it, when you knew this was the correct survey? the witness answered: I received instructions from the surveyor general to make the Shoshone conform with the official notes; there was to be a joint survey made, but it was not made jointly. I set the stakes according to the official notes of the Shoshone; that is, I left the stakes standing as they were, because I wanted the deputy who had made the Shoshone survey to see that they were as I represented, but I set stakes as the official note called for; that is, the survey as is shown on the plat.

In answer to the question: Why didn't you put on this map as the official record? the witness said: This was an adverse plat. It is correct as the stakes were found on the ground, not by the official survey.

Mr. Loring showed me the stakes of the Kirby claim in September, 1895, and showed me one official stake which he had placed there. It was at a point about 136 feet southerly from cor-
181 ner No. 2, marked 2–771; he could not find any other corner. I never saw it. I looked for it. I looked on the course of this easterly location, end line of the location.

In answer to the question: What kind of ore did you find in that big vein you spoke of? witness said: It is not ore of a commercial value. I don't know as I said ore exactly; iron-stained matter; quartz, broken-up quartzite, clay gangue—good mineral indication.

Do not know how far it was from the surface; it would be less than 100 feet, probably would be 50 feet. The material that I called ledge, about 80 or 90 feet from the face of the cut, has clay in it—talcy-looking clay; it is whitish yellow or a yellowish white. The mineralized matter is quartz and iron.

In answer to the question: How much quartz was there in that vein? witness said: I would hardly like to say. I never made a test of it. I could not make an estimate anyhow; I am not a chemist, could not tell what percentage of quartz was broken-up quartz; no big body of quartz in it. There were little streaks the size of a pencil, probably, mixed all through it, mixed with broken quartzite and iron. I think there is a little pyrites of iron. I have seen quartzite there that has no pyrites of iron showing in it. The streak first shows a few feet from the rock in the bottom of the tunnel, at the mouth, or just a little up from the bottom, the same kind of matter that is in the larger vein. I don't mean the solid quartz; it is broken up, specks of clear quartz; just as large
182 specks of quartz as quartzite; specks and streaks; not a very continuous streak of anything. The iron is mixed directly through. You won't find any large chunks of iron.

In answer to the question: Is not that iron stain? witness answers: Pyrites of iron. I don't consider it vegetable stain; I don't think it is discolored by the elements; it is a reddish brown and quartz in it. I don't think it is discolored by the elements; it would probably be colored if exposed to the surface for a number of years. This discovery is about 15 feet from the first set of timbers; it is not solid enough to show a seam. It is a small seam in the rock, filled in with this mineralized matter. There is a little manganese; I don't know how much from there, that I took to be manganese. I have not made a test.

In answer to the question: Don't you think that grass and vegetable matter would make the stain you found within 15 feet of the surface there? the witness answered: It does not look like vegetable stain. These specks of quartz you could hardly say they were in quartzite, because there is a little seam with clay selvage, and in this seam is this mass of broken-up matter, partly quartz and partly quartzite. The seam 45 feet further in contained about the same matter as the small one near the mouth of the tunnel; might be a little better; not much difference. There is no continuous streak of quartz, and no attempt was made to follow it. The large streak, 80 or 90 feet from the face, was principally of soft, broken matter, more compact than the smaller ones, soft and slopes in,
183 caved a good deal there, too, in the west drift. There is some mineralized matter. There was iron manganese, I should think a little lead, very little. There was oxide and maybe a little manganese. The iron was blackish and reddish. I did not notice any metallic iron in it, if you mean refined metal. It was mixed through, a little pyrites principally and oxide. It is quite a seam of clay there on the gangue. I did not take the percentage of quartz. I don't know as to the amount of each ingredient. There is a drift driven each way on this streak. The vein is about the

same in the drifts as the tunnel; can't say that it has improved much; there was no sinking on it. I think there is a little silver in it. The Bunker Hill & Sullivan Company employed me to do this work.

In answer to the question: Have you put on all the work extending from the Stemwinder tunnel down in the neighborhood of this ground here? the witness answered: I have put all on that there is, up to the date I made the survey. I made the survey November 15th, 1896.

In answer to the question: How much in distance would the Stemwinder tunnel be below the Kirby tunnel perpendicularly? the witness said: I have no idea. But he afterwards testified that it would be probably two or three hundred feet.

I think I have described all the evidence of a ledge that there is in the Kirby. When Johns told me where their point of discovery was we were standing right close to this small streak; it had gone within a few feet of the rock he mentioned as being the rock
184 in place, which they claimed as the discovery point, just inside or just outside of the tunnel, I don't remember which; I don't remember that he referred to this streak.

In answer to the question: How did you come to fix that discovery at the time you made the official survey, other than at the mouth of the tunnel, and now claim it is in the tunnel? witness answered: I took that as the initial point, the point where the notice was posted. As I said before, our instructions say at the point of discovery, where the notice was posted. I have no reason to give why I did not take the other point where the discovery appeared to me to exist. I very often leave out that. I consider where the notice is posted the discovery point. I don't consider it necessary to get the exact point. The distance from the face of the tunnel to the surface would be 150 feet, might be less. I think it would be over 100. The incline as shown on the map, being at the face of the tunnel, is 48 feet deep, sloping at an angle of about 59 degrees. Don't remember whether it was timbered or not; have not been down there for some time. They followed a small streak right under the wall, smooth wall; I don't know whether it is a slip in the rock or not. I took what I marked as the discovery from the official notes. I did not indicate the Emma and Last Chance mines as they are on the official survey, for the reason that the conflict between those two claims was settled.

In answer to the question: Was the discovery on the
185 Kirby similar to that on the Last Chance? witness answered: There is some lead shows in the discovery of the Last Chance, a little galena in it. I say it is different, but the surroundings are similar. The gangue is the same, a little galena at the——

In answer to the question: Was there any galena in the Kirby? witness answered: I did not see any galena at the discovery of the Emma. Of course, I can't say about those cuts, but I saw no galena whatever; but there is a little shaft, about 15 to 20 feet from the discovery point of the Emma where there is galena piled up and galena in place. There is some clean ore in this shaft or incline.

In answer to the question: Do you mean to say the Emma discovery is similar to the Kirby? the witness answered: The gangue around that little cut which I located from the official notes, the gangue is similar. There is no ledge showing there.

In answer to the question: Is the quartzite similar to that of the Kirby? the witness answered: It is stained a brown iron stain; it is similar. It is what I call similar. You can't tell much about it. Of course, this exact point was not shown to me by anybody acquainted with it; simply run from that corner.

In answer to the question: You say it is similar also to the Stemwinder discovery? the witness answered: I don't know the exact point of the Stemwinder discovery. The rock itself seeme to be the same.

186 Redirect examination by Mr. McBRIDE:

Witness, explaining a discrepancy between the plat, upon which he is being examined and the official survey, says: It is shown on this plat just as I found the stakes on the ground. When I sent in my notice of the Kirby to the surveyor general, I showed the Shoshone as I found it staked, stakes marked and up in place. That of course showed the discrepancy between the notes filed in his office and the notes shown by me. Whenever there is a discrepancy an order is issued for the deputies who made the survey to right that difference, go on the ground and make a joint survey, if necessary. The deputy who made the Shoshone (Mr. Miller) and myself were notified by the surveyor general to correct this. Mr. Miller had not any other work up there, and requested me to go up on the ground and set these stakes as called for by the official notes, and I did so. The correction consisted in setting the stakes as they ought to have been according to the return of the field-notes. I found two where they ought to have been. The rest were not. The conflict as shown there corresponds to the survey which was made upon the ground, which was shown upon the ground at the time the survey for the Kirby was made. The mistakes were not mine. I made the correction at the request of Mr. Miller.

Whereupon F. W. BRADLEY was called on behalf of plaintiffs and testified:

187 My name is F. W. Bradley. My business is mining. I am one of the plaintiffs in this case. Am acquainted with the ground in dispute; have been over it many times. Have examined the tunnel in question. Have seen all the surface corners. Have seen the corners of the original location. I went on the ground first I think in the spring and summer of 1893. At that time took a look in the tunnel. In August and September I made several trips to satisfy myself as to the position of the corners. Made a trip in August with Mr. Rutter and Mr. Smith. In September I made a trip with Mr. Loring, Mr. Rutter and Mr. Porter and Mr. Burbridge. We went first to the southeast corner of the Kirby. This corner here (pointing to the map) we found a stake standing up against an old snag. The only marks on the stake were the

figures 4–771. We then went along the eastern end line and found a mound of rocks in the ground. I had an interest in the ground at that time; found a stake lying within a few feet of the mound, marked "corner 1–771." We next went to this northwest corner (indicating on the map), found a fir tree squared 4 by 4 inches at the top and cut off 5½ feet high; could not read anything on it. Mr. Loring and Mr. Rutter pointed it out to me.

To that part of the testimony which says that Mr. Loring and Mr. Rutter pointed it out to him, objection was made by defendant, objection sustained, on the ground that Loring and Rutter were not original locaters, and exception was taken by plaintiffs.

188 Witness continued: We then followed southerly along an old blazed line. We came here to a fir tree squared, 2 feet at the top, cut off 4½ feet high. On it were the following words in lead pencil: "Southwest corner post, Kirby lode." Witness then makes a correction and says: No, this was the west center end I am describing now, and further corrects by saying: A fir tree squared 6 by 6, cut off 5½ feet, marked in lead pencil, "West end center Kirby." We then continued on the old blazed line until we found there a tree cut off 5½ feet high, squared 2 feet at the top, and on it the pencil marks, "Southwest corner post Kirby lode, located July 11." We then went down this line (indicating on the map). That was the end of that trip, but before we had reached this corner we went through these underground workings.

Being asked to describe what he saw in the tunnel, witness said: I think they struck solid formation 12 feet from the mouth of the tunnel, about 15 feet in when first saw indications of ore. The flat seemed dipped about 50 degrees from the horizontal, about 2 inches in width, quartz separated from the hard quartzite by clay and filling, consisting of oxide of iron, a little manganese and some quartz. There are a number of those seams along there. Just before reaching the forks of the tunnel there is a vein about 6 inches wide; that is, dipped from the horizontal about 60 degrees. Between all these veins is hard quartz. This vein is well marked and separated from the quartz by clay on each side. The vein consists of hard

189 quartz, manganese, boxote and quartzite. Going on into the tunnel there is a vein 2½ to 3 feet wide. That has a dip from the horizontal of about 70 degrees. On each wall there is a selvage or gangue of clay, half an inch to 2 inches in thickness. The vein filling is oxide of iron, stringers of quartz and quartzite, manganese, showing indications of lead stain. At the face there is an incline winze sunk to a depth of 40 feet on a small stringer. At the bottom of that winze that stringer has been drifted on a ways. On that drift I did not take samples myself, but I had samples taken by other parties who had them assayed. In my judgment, those stringers or veins are independent of the larger ones in which the drift is made—real veins, ore veins. I have been through the underground workings of the Stemwinder and Last Chance, and find similar seams in these properties. I have been in charge of the Bunker Hill mine for six years and a half. The indications on

the Kirby are such as in my judgment would justify a miner in working the claim.

To this last answer the defendant objected, which objection was overruled, and the defendant allowed an exception.

Witness was then asked if within his own knowledge men would not work upon such indications as were there seen, and to this defendant objected as incompetent and immaterial, which objection was overruled and an exception allowed. Witness answered: I have done such work in that country as has led me to ore
190 on just such indications as there are there. The vein near the forks of the tunnel is a mineral vein, and the large vein which was described as being 3 feet wide carried lead and silver, the difference between the veins being in their size. The filling is the same. The veins are separated from the hard country rock by well-marked walls. I purchased the interest in October, 1894. It was after the location of the Shoshone. The Sullivan, Lackawanna, Bunker Hill, and Last Chance have no better outcrop or showing in the surface than the Kirby. In some instances drifts were run in hundreds of feet on the vein matter, but we know that they led to ore.

I was in the workings of the Kirby claim in 1893; examined the veins and drifts. Mr. Rutter and myself did the assessment there in 1895 and 1896. Filed our declaration to hold the claim in 1894. I filed a similar declaration to the one mentioned in Mr. Rutter's testimony. Mr. Rutter and myself were not together at the time; made separate declarations. We did the assessment-work in 1895 and 1896. I know it was done; I measured the work both before and after.

Cross-examination:

Upon cross-examination the following proceedings were had:

Q. What interest have you in this claim, the Kirby?
A. I have a one eighth interest.
191 Q. Did you hold that eighth interest for the Bunker Hill & Sullivan Mining Company?

Mr. McBRIDE: This is cross-examination.

The COURT (addressing defendant's counsel): You mean to raise the question that you raised the other day? As I said then I had some doubts as to how that statute should be construed. Of course, that statute was mainly, as I understand, to allow parties to sue in legal actions, as they might in equity suits. I know what the practice has been in courts, to allow parties who are not the real parties in interest to prosecute these suits, as I said, on bills of exchange and notes. Since then, I have thought of another question. My recollection is of the Idaho statute, in which a trustee of an express trust may bring the action in his own name. There is a provision of that kind in the Idaho statute, and these parties, if it is as you asserted the other day would be trustees of that character and can bring an action in their own name. If this gentleman

holds this property for the benefit of another, he is a trustee of an express trust, and can sue in his own name.

Objection sustained. Exception.

Mr. HEYBURN: I will ask a few questions in this line to make the record.

Q. Mr. Bradley, have you made a deed to the Bunker Hill & Sullivan Mining & Concentrating Company for this property?

Same objection. Same ruling. Exception.

192 (Mr. Heyburn argues.)

Objection withdrawn.

A. No, I have not.

Q. Or any interest in it?

A. No, I have not.

Q. They are the real owners of the interest, are they not?

Mr. MCBRIDE: I object to that.

Objection sustained.

Q. Are they not the real owners of the entire Kirby claim?

Same objection. Objection sustained.

Mr. HEYBURN: Note an exception to each of those rulings.

Q. Are they not furnishing the money, meeting the expenses of this lawsuit?

Objected to. Objection sustained. Exception.

Q. Is it not true that whatever you have done in the way of assessment work on that claim during the years '94, '95, and '96, you have done as the representative of the Bunker Hill & Sullivan Mining and Concentrating Company, and they have paid for the same?

Same objection. Same ruling.

Q. Did you not file a sworn statement that they were the owners of this property, in the recorder's office of Shoshone county, Idaho?

Objected to. Objection sustained. Exception.

Mr. HEYBURN: I want to identify these papers to show

193 them a part of the record. I show the witness these papers, which I showed you yesterday, and ask if you did not make and cause to be filed the original of these papers in the recorder's office of Shoshone county, Idaho?

Mr. MCBRIDE: I object to that as immaterial and irrelevant, attempting to establish title outside of the record.

The COURT: There is one question. There is some ruling, I don't remember where it is now, that work done on a claim by somebody else than the owner, where it is done for some other purpose than to do the assessment-work, is not competent. If it is done for the assessment-work, then it is valid.

Objection sustained. Exception.

Mr. HEYBURN: Let the record show that the witness—I have shown him both sets of these—the witness has identified them, and

says they are certified copies of originals which he has prepared and filed. I offer this in connection with this cross-examination at this time, for the purpose of showing that the annual labor required by statute to be done upon this claim has been done by a party not the party in interest, a party not shown to have any interest in the claim, and I offer it in connection with other testimony to show that no other assessment-work has been done by the party not shown to have any interest in the claim. I also offer it for the additional purpose of showing that the Bunker Hill and Sullivan Mining and Concentrating Company is the real owner of
194 this property, and that the party sustaining this suit has no interest in it whatever.

Mr. McBRIDE: The objection, of course, is the same. There is another objection. Here is an attempt to prevent Mr. Rutter, who is the owner of seven-eighths interest, from giving any testimony that would go to contradict that declaration by a third party, that he has done no work——

The COURT: I will say again, the objection is sustained; objection to your offer is sustained.

Mr. HEYBURN: For both purposes?

The COURT: Yes, sir.

Q. Have you done any other assessment work on this claim than that which was paid for by the Bunker Hill and Sullivan Mining Company?

Mr. McBRIDE: I object to that, . peating the same thing.

Objection sustained. Exception.

Mr. HEYBURN: I ask if he did any of these things that he claims to have done, except as paid for by the Bunker Hill and Sullivan Mining and Concentrating Company. Do I understand if the Bunker Hill and Sullivan are the only people who have done any assessment-work, that this plaintiff can benefit by it, and recover by it?

The COURT: If the work was done by any parties interested. If the work was done by accident by some other party for some other object than doing the assessment-work, it would not be good.

195 Mr. HEYBURN: I understand if a stranger does work on my claim for the purpose of doing my assessment-work without any knowledge on my part, I can take the advantage of it?

The COURT: No. If it was done by a stranger, with an agreement or understanding of the owner, it would be sufficient; but if done by some stranger without any association whatever with the owner, and for some other purpose than doing the assessment-work, it would not be good.

Mr. HEYBURN: I propose to show now that no assessment-work has been done on the Kirby claim, since the year 1894 by either of the plaintiffs, or any person under whom they claim; that whatever work has been done on the claim during that time has been done by the Bunker Hill and Sullivan Mining & Concentrating Company,

not a party to this action, and not shown to have any interest in this property.

Mr. McBRIDE: This is another attempt to get in the same testimony.

The COURT: If he can show that that is not true, he has a right to do it, even though he is aiming to get something else in in another way. I can't refuse the offer that he makes, even though it be an indirect way of showing that the Bunker Hill & Sullivan are the real owners of this property. If the work was done, and done for the purpose of doing the assessment-work on that claim, it
196 would make no difference where the money comes from, it is done; but the offer which counsel has made I can't reject.

Q. Did you do or personally pay for any work upon the Kirby claim in the year 1894?

Mr. McBRIDE: I object to what he personally paid for.

The COURT: I think it is immaterial, if the work was done, whether it was paid for or not. I think the question is whether the work was done as assessment-work on the Kirby. I sustain the objection to that part of it as to whether he paid for it or not.

Q. Did you do any work on that claim in 1894?
A. In 1894?
Q. Yes.
A. No, sir.
Q. Did you do any work on that claim in 1895?
A. I had the assessment-work done for 1895.
Q. By whom?
A. By two men, Jarrett Jarrett and Llewellan Llewellan.
Q. Who paid for it?
A. Mr. Rutter.

Mr. McBRIDE: I object to the question who paid for it, and whether they were paid at all.

Objection sustained.

Mr. HEYBURN: Then I would like the answer stricken out. Note an exception.

197 Q. Did not the Bunker Hill & Sullivan Mining and Concentrating Company furnish the money to pay for that assessment-work?

Mr. McBRIDE: I object to that.

The COURT: To avoid all further controversy I will let him ask that question, and I will sustain your objection to it, and you can take an exception.

Mr. HEYBURN: Now, I desire to ask the same question with reference to the assessment-work in 1896. Of course I must ask the questions to make the record.

Mr. McBRIDE: A single exception will answer as well as half a dozen.

The COURT: You are repeating the same thing for 1896. Why is it necessary to repeat for 1896? You have your exception in

once, and if I am wrong in that, the court will reverse it upon one for 1895 just as well as for a dozen years, I will indulge the counsel to do it, although it doesn't seem that it is necessary to ask the same privilege for 1896.

Q. Did you do the assessment-work for that claim in 1896?
A. Well, I had the assessment-work done.
Q. Who paid for it?

Objected to. Sustained.

Q. Did not the Bunker Hill and Sullivan Mining and Concentrating Company pay for it?

Objected to. Sustained.

198 Q. Has there been any work done on the Kirby claim since 1894 by any persons that has not been paid for by the Bunker Hill and Sullivan Mining and Concentrating Company?

Objected to. Sustained.

Q. Has there been any expenditure made with reference to labor, assessment-work, that was not paid for by the Bunker Hill and Sullivan Mining and Concentrating Company?

Mr. McBRIDE: I object to it; claim it is leading.
Objection sustained.

Q. Now I desire to ask the same question as to 1893, whether or not since 1893 any work has been done upon that claim that has not been paid for by the Bunker Hill and Sullivan Mining and Concentrating Company?

Same objection.
The COURT: I will have to interfere here. I sustain the objection.
Exception.
Mr. HEYBURN: You have an exception to each of those rulings. I desire an exception noted in the record for each of them.
The COURT: Certainly. The exception is in the record.

Whereupon JOSEPH McDONALD was called on behalf of plaintiffs, and testified:

199 I reside in Gem, Idaho. Have been in the Cœur d'Alene country since 1892. My business is mining and operating mines. Have been so engaged since 1873. Am 42 years of age. Am familiar with mines and mining. I am at present manager of Helena and Frisco Mining Company, and consulting engineer of the Morning and You Like mines at Mullan. Had two years' and a half experience as a miner with pick and shovel in Enterprise mine, California. Worked over a year at another place in California; at another place for 18 months, and at Bodie, California, was superintendent of the Jupiter mine for six months. At Leadville, Col., I was manager of the Little Chief mine for over a year. In Summit county, Cal., was superintendent of the Robinson mine for over a year. From there went to New Mexico to examine property for New York people. Was superintendent of the Solid Silver mine in

Grant county, New Mexico, when I came back to Leadville under engagement for the Mansfield Mining Company; and in various other places where I superintended mines before coming to the Cœur d'Alene. Have done nothing else but mining and superintending mines. Have been on the Kirby ground near Wardner. Was in the Kirby tunnel; examined it on the 17th of May. Have seen the map exhibited (pointing to map). I went into the mouth of that tunnel, examined the different veins. About 12 or 14 feet from the mouth there is a seam composed of quartz clay, iron manganese stain upon it. Passed on to another vein from 6 to
200 10 inches. That vein is similar to the others, iron, quartz, manganese stain, and some broken up, fine pieces of quartzite heavily iron-stained. The third vein after leaving the mouth of the tunnel was from 2 feet 10 inches to 3 feet in width, and shows quite a strong vein at that point, having a selvage or gangue of about 2½ inches. In the west drift the foot wall is exposed nicely; at the very face you can't see the hanging wall. Next went into the winze. I did not get down into the winze or into this drift here at all. The veins pitch in a southerly direction. As a miner I would certainly follow such indications as are seen in the Kirby. It is as good as the old discovery on the Helena and Frisco. The vein in the Kirby is distinct from the country rock. The country rock is quartzite. This is quartz, clay, iron, manganese, with some broken iron-stained quartzite in it.

Cross-examination:

About 25 per cent. of the vein matter in the first vein mentioned is quartz. Witness afterwards says: About 20 per cent., I should think. It lies in a streak, with the vein having the same pitch that this streak has. The white quartz has the same pitch. Some of that quartz looks very iron-stained. If you take it out and break it it is pure white quartz. If you did not break it you would think it was iron-stained quartzite. It is mixed pretty much
201 through, you know. The iron is mixed through it, too, it seems to me. The vein matter all seems to be mixed together. The gangue is small. The pitch is distinct; what a miner would call a vein, distinct pitch from the country rock, with a hanging and foot wall. The second vein mentioned lies practically the same as the first one, only a little larger, and the same material. I suppose there was 25 per cent. of it quartz. There was not much talc, a little, though; just enough so you can stick your candlestick in it. There was no drifting done on it. The third one is from 2 feet 10 inches to 3 feet wide; there is quite a little quartz in that; would have to guess at the amount. That part which is not quartz is clay. There is quite a good deal of clay; the clay is solid from 2½ to 3 inches, just as natural as life; no wash at all. It has the appearance of having mineral in it, but I had no assays taken from it. That is all I saw as evidences of ledges, except at the winze; there was not much appearing at the winze. Had the appearance of being mineralized. I would take chances on following these indi-

cations in expectation of getting ore. I would not follow it a thousand feet. I would spend my own money in following it. I would be willing to go direct on it if it appeared as well as it did when I examined it, knowing what I do of the country.

Whereupon N. S. KELLOGG was called on behalf of plaintiffs and testified:

202 I reside at Kellogg, Idaho. Went to that country in 1885. Was one of the locators of the Bunker Hill mine. Am acquainted with the Kirby ground. The ground was vacant in 1885. I don't know whether it was occupied in 1886 or not. I have examined the ground near where the tunnel is run; examined it on the 17th day of May. Went to the point where the tunnel commences. Saw the mineral where it cropped out from the surface; also saw in the tunnel about 15 feet from the mouth. Saw it on the surface just above the mouth of the tunnel, a little to the right. Saw ore on the surface lying a little above and to the right of the tunnel. Saw the vein in the tunnel 15 feet from the mouth. The indications were such as I would follow if I were prospecting, knowing the country as well as I do.

Whereupon JARRATT JARRATT was called on behalf of the plaintiffs and testified:

Reside at Wardner. I am a miner. Have been engage- in mining 12 years; engaged in the Wardner camp six years. Know the Kirby ground; visited the ground. The last time I went there was to examine the discovery. About 15 feet inside of the tunnel I saw a kind of vein there, some quartzite, some talc and iron stain. Saw no indications of a vein on the surface. A vein about 2 inches wide containing quartzite and iron stain. There was lots of difference between that and the country rock; something like a vein that a man should follow. I would call it a lead. Followed exactly the same thing on the Last Chance and got ore.

203 Whereupon ALBERT BURCH was called on behalf of plaintiffs, and testified:

Reside at Wardner; been there about a week; came from Oregon. My business is mining; am a mining engineer; have been engaged in that business about eight years; think I am a practical man in that business; have examined the Kirby ground; am familiar with the map. There was an old cut above the tunnel. I had it cleaned out and examined the rock, and discovered there a vein of clay lying at right angles to the course of the tunnel, filled in with broken quartz and quartzite, with seams of oxide of iron. I should call that a vein of mineral-bearing rock in place. I took samples and delivered them to the assayer, Mr. Linney, and requested him to assay them. I think the vein is such as I would follow in a mineral country like that. I regard it as a mineral-bearing vein.

Cross-examination:

I do not think that open cut is marked on the map in any way. It is 10 or 15 feet from the mouth of the tunnel, in the neighbor-

hood of 8 or 10 feet from where the location notice was posted, as pointed out to me; did not measure the width of the seam referred to in the cut; think it was three or four inches. Probably a quarter or third of the place in the vein was filled with quartz; broken-up pieces of quartz; probably nearly half of it was clay. I am superintendent of the Bunker Hill and Sullivan mine.

204 Whereupon FREDERICK BURBRIDGE was called on behalf of plaintiffs, and testified:

Acquainted with the Cœur d'Alene country nine years. I have resided in Kellogg nearly four years; am familiar with the Kirby ground; have visited the ground several times; was in the tunnel. At a point about 15 feet from the mouth of the tunnel there is a vein from 2 to 4 inches wide, filled with quartz and iron—iron-stained quartzite and clay. It was a very distinct vein. I have been a miner; am acquainted with mining; have done hammer and drill work myself; carried on mining operations myself. I am an assayer; have also been an ore-buyer. I should say that that is a mineral vein, and I should think a miner would follow it. I made two assays of samples taken from that vein; the first one near the mouth of the tunnel. I got a half ounce of silver, a second result of .6 of an ounce; took a sample from the second vein, 45 feet from the mouth of the tunnel. It was a 6 inch vein. I got .7 of an ounce of silver; did not assay for lead; have had 9 or 10 assays altogether. From one I took another sample about three feet above the last one referred to, and got .4 of an ounce of silver; only silver assays. From another assay I got a half ounce of silver; took a sample from the bottom of the winze, which gave me .6 of an ounce of silver; and another in the same neighborhood, which gave .5 of an ounce; and from a point in the winze about 20 feet from the bottom another sample gave .3 of an ounce; and another
205 sample from the vein, near the forks of the tunnel, which gave .4 of an ounce. In making the assay I used a half an assay ton, about 14½ grammes. I took it from 10 to 20 pound samples of each. I was not assaying it for lead. I used pure lead. I never prospected particularly. The clay mentioned is composed of aluminum; came from the decomposition of rock and the working of the walls of the vein—that is, of the vein filling. There is some quartzite in the vein filling. I think probably there is aluminum in the vein there; I don't think I found any in the quartzite. I am assistant manager at the Bunker Hill.

Whereupon W. H. LINNEY was called on behalf of plaintiffs and testified:

Reside in Kellogg. Am an assayer; have been in the business a little over 20 months; working at it nearly every day during that time. Am a practical assayer. I can make an accurate assay. I made an assay for Mr. Burbridge yesterday, resulting in .1 per cent. lead and .3 ounces of silver; the sample was marked "From Kirby discovery." I have made other assays from the Kirby ground; took the samples myself, on the 20th of October, 1896. I took the

first samples from the sides of the drift at the bottom of the incline, along the whole length of the drift. I got .1 per cent. lead, .2 ounces of silver. From another sample at the bottom of the incline I got .2 per cent. lead and .2 ounces of silver. No. 3, sample, which is from the lower half of the incline, and some from the roof
206 of the incline, it gave .2 per cent. lead and .4 ounces of silver. No. 4 sample, at the head of the incline, gave .1 ounce of silver. Another sample from the right-hand drift gave .3 ounces of silver, no lead. From the black manganese and iron oxide taken from about 40 feet from the mouth, got .3 per cent. lead and .2 ounces of silver. Sample No. 7, near the mouth of the tunnel, gave .2 ounces of silver.

At this time counsel for plaintiffs offered in evidence a certified copy of adverse filing, to which objection was made. First, because the foundation has not been laid for it; second, because it has not been shown by competent evidence that a valid location was ever made, that no valid location was ever made: and third, that it is not shown that the plaintiffs had been claiming title to the Kirby location by the performance of any labor as required by law; fourth, that the area of ground sought to be recovered in this action is not within the boundaries of the Kirby claim as the same existed, if they existed at all, at the time of the survey for patent or adverse claim. The objection was overruled, and an exception allowed.

Whereupon F. W. BRADLEY was called on behalf of plaintiffs and testified:

Q. What is the reasonable value of this claim as you estimate it, the ground in controversy?

I think it is worth ten or fifteen thousand dollars.

Thereupon the plaintiffs rested their case.

207 *Defendant's Case.*

Thereupon counsel for defendant moved to dismiss the plaintiffs' bill upon the following grounds:

1st. For the reason that this court has no jurisdiction of this case as a court of equity.

2nd. That the plaintiff has failed to show that this ground was vacant, unoccupied, public mineral land, subject to location at the time of the location of the Kirby claim, but, on the contrary, has shown by the locator under whom it claims that at the time the location was made, the ground was not a part of the public domain or subject to a location; that it had been located as the Edith claim, which claim was then a valid, subsisting mining claim; that the discovery and location of the Kirby was within the limits and boundaries of the Edith location.

3d. The plaintiffs have failed to show that prior to the making of the location of the Kirby they discovered any lode or ledge of mineral-bearing rock in place, such as the law requires as the basis of a mining location, but, on the contrary, have shown affirmatively

by the testimony of the locator that they did not make such discovery.

4th. That if any discovery has been shown to have been made, or any ledge to have been discovered upon the Kirby claim that it was long after the location of the claim.

208 5th. That no discovery of any ledge, such as the law contemplates a mining claim should be located upon, has been made, and that such fact appears from the testimony of the plaintiffs in this case.

6th. That the area of ground claimed in this suit lies outside of and beyond the lines of the Kirby claim, as they are definitely fixed and marked upon the ground by the official survey made by Mr. Loring; that the southwest corner of the claim is extended about 300 feet beyond where it was placed, and notice was given to the world that they had drawn this line.

The motion to dismiss plaintiffs' bill was denied, and an exception allowed.

At this time defendant offered in evidence certified copy of the location notice of the Shoshone claim, which was objected to, objection overruled, and an exception allowed.

The same was marked Defendant's Exhibit No. 3, and is as follows:

Notice of Location.

Notice is hereby given that the undersigned is a citizen of the United States, over the age of twenty-one years, and has discovered a ledge of mineral-bearing rock in place bearing silver, lead and other precious metals, at a depth of about twelve hundred (1,200) feet directly under the point where this notice is posted, and, for the purpose of locating a mining claim based upon said dis-

209 covery, has this day located and claim fifteen hundred (1,500) feet upon said ledge, together with three hundred (300) feet of surface ground on the northeasterly side thereof, and three hundred (300) feet of surface ground on the southerly side thereof. Said claim situated in Yreka mining district, Shoshone county, Idaho, near the town of Wardner, and on a mountain lying between Milo and Deadwood gulches, and is more particularly described as follows:

Beginning at this location notice, which is posted at a point south eighty (80) degrees west, one hundred and forty-seven (147) feet from the southwest corner of survey No. 551, the "Last Chance" mining claim, and being about twelve hundred (1,200) feet directly over the point of discovery; thence running south sixty-two (62) degrees east four hundred (400) feet to the southeast center end stake; thence north forty-one (41) degrees east, three hundred (300) feet to the northeast corner stake, thence north sixty-two (62) degrees west ten hundred (1,000) feet to corner No. two (2) on the southeast end line of survey No. 615, the "Skookum" Lode claim; thence south eighteen (18) degrees and thirteen (13) minutes west along the southeast end line of the said "Skookum" Lode claim, one hundred (100) feet, more or less, to corner No. three (3), being the southeast corner

No. four (4) of the said "Skookum" lode; thence along the southerl side line of the said "Skookum" lode north sixty (60) degrees wes five hundred and thirty (530) feet, more or less, to corner N
210 four (4); thence south forty-one (41) degrees, two hundre and ten (210) feet, more or less, to the northwest center en post; thence continuing in the same direction three hundred (30 feet to the southwest corner post; thence south sixty-two (62) d grees east twelve hundred feet, more or less, to a point, on the nort erly side line of the "Sold Again" Lode claim, marked by a post thence northeasterly along the said north side line of the said "Sol Again" claim four hundred feet, more or less, to a post; thenc north forty-one (41) degrees east sixty (60) feet, more or less, to th southeast center end stake, the place of beginning.

All of which said stakes are upwards of four (4) inches square an four (4) feet high.

And I hereby claim four hundred (400) feet, running in a south easterly direction, and eleven hundred (1,100) feet running in northwesterly direction from this notice and the point of discover thereunder, along the course of said ledge, the said mining claim t be known as and called the "Shoshone" Lode claim.

This claim is located and marked on the ground this twenty-firs (21st) day of March, A. D. one thousand eight hundred and ninety four. And it is the intention of the locator to work and mine th said lode through and by means of shafts and tunnels connecting the said discovery point with the surface of the ground.

Dated this 21st day of March, A. D. 1894.

W. C. MILLER, *Locator.*

211 STATE OF IDAHO, } ss:
County of Shoshone, }

I, W. C. Miller, do solemnly swear that I am acquainted with th mining ground described in the notice of location herewith calle the Shoshone ledge, lode, or claim, and that the ground or clain therein described, or any part thereof, has not, to the best of my knowledge and belief, been heretofore located according to the law of the United States and of the State of Idaho, or if so located, tha the same has been abandoned or forfeited by reason of the failur of such former locator to comply in respect thereto with the re quirements of said laws.

W. C. MILLER.

Subscribed and sworn to before me this 23d day of March, A. D 1894.

[NOTARIAL SEAL.] E. M. HEYBURN.

Recorded March 26th, 1894.

Whereupon W. CLAYTON MILLER was called on behalf of defend ant and testified:

My name is W. C. Miller. Am acquainted with the Shoshone claim. I located it in the latter part of March, 1894. I made a discovery on the ground of rock in place bearing mineral—galena

lead, and silver. Posted location notice above said location
212 on the ground; put up the stakes and marked them. Being shown location notice witness said that was substantially a copy of the one posted. I marked three corners on the southeasterly end line of the claim, stakes 4 or 5 inches square and 5 or 6 feet high, planted and marked. I made a broken side line on the north; proceeded to the southeast corner of the Skookum lode, put up 2 side stakes, marked them as the side-line stakes of the Shoshone lode. Put up the northwest corner; put up the west center end stake and southwest corner, planting and marking them; put up 2 south side-line stakes, one along the line of the Sold Again, and adjoining a claim already surveyed. I made an official survey of the claim; have a certified copy of the plat in my pocket, which was approved August, 1895. It is a delineation of my survey of the Shoshone mining claim, and is an official survey. It conforms, substantially, to the original location as I made it upon the ground, and is within the boundaries of the original location.

The plat was offered in evidence, admitted and marked Defendant's Exhibit No. 4.

Witness then testifies: Discovery was made in a tunnel underground vertically underneath the location notice posted on the surface, and was a part of a vein in place, bearing galena, solid. In marking the boundaries I marked the northeast corner No. 1; the two side-line corners 2 and 8, northwest corner No. 4; southwest corner No. 5; two south side-line corners 6 and 7, south-
213 east corner No. 8; posts were about 4 inches square and 4½ or 5 feet high, and described the corner one 1126 and two 1126. I am acquainted with the claim called the Kirby. I have surveyed to some of the corners of that claim. Did so when I was making the survey of the Shoshone. Had seen one or two of the corners previous to that time; some of them I never saw. Mr. Loring gave me a sketch showing his notes of his survey.

To the testimony with reference to Mr. Loring giving Mr. Miller a sketch plaintiffs, by their counsel, objected on the ground that their rights could not be thus prejudiced by what Mr. Loring did without authority, which was overruled, and an exception allowed. The further objection was made that Mr. Loring, being present, would be the proper person to testify to the sketch made by him, which was overruled, and an exception allowed.

Witness continued: Two of those corners I made myself. Two of them are claimed as the original survey of Mr. Loring; that is, the northeast and southwest. The southeast and southwest corners I have never seen. I got those by platting them from the notes he gave me, and have a plat which conforms to those notes.

The witness is then handed a map and asked to indicate on it the boundaries of the Kirby according to the field-notes given by Mr. Loring, and testifies: This is the claim indicated in yellow, marked along the northerly side line: "The Loring Survey." I received
214 the information from Mr. Loring previous to locating the Shoshone. The stakes of the Loring survey were marked "771," which is the number of the present Kirby survey.

The Shoshone discovery on the map being examined is a small point there marked red "dis." It is not within the boundaries of the Kirby claim as shown me by Mr. Loring; the southeast corner of the Kirby was a corner marked 4 of the yellow survey, yellow plat, according to the notes given me by Mr. Loring.

The witness was then asked to state his purpose in seeking this information from Mr. Loring prior to making the Shoshone location, to which objection was made by plaintiffs, objection overruled, and an exception allowed. Witness answered: I wanted to find out where the lines of the Kirby were, in order to make a location outside of their lines.

Cross-examination by Mr. McBRIDE:

I have been acquainted with the surface of the Shoshone claim for seven or eight years.

Upon the witness being asked if he had not located that ground before, the question was objected to, objection overruled, and an exception allowed. Witness answered: I may have, but I have no recollection of it.

Upon witness' attention being called more particularly to an attempt to locate, the question was objected to, objection overruled, and an exception allowed. Witness answered: I think that ground was located, a triangular corner of it before, but it was aban-
215 doned, so far as I know. I did locate a claim there called the Last Chance Fraction. I think it took in the ground between the Skookum and Last Chance. I have forgotten how that lay, because I did not consider them alive. They were located about 4 or 5 years ago. I think I was the locator, and believe I transferred them to the Last Chance Mining Company.

The question was asked: Where was the Wardner location? which was objected to as immaterial, objection overruled, on the ground that plaintiffs are entitled to show witness' familiarity with the ground, and excepted to on the ground that the claim was located afterwards and it would not be material.

Witness then answered: I think I located the Wardner claim. It covered the ground east of the Shoshone ground. It is now abandoned. It covered part of the ground claimed by the Kirby. My object in going to Mr. Loring was to find out where the boundaries were as surveyed by him. I went to him some time before I made the location. There is no date on the letter or paper that Mr. Loring sent me; have had it a very long time, and I have forgotten the circumstances, except that I wrote to him for it and asked him for it and he sent it to me. Outside of that I have no recollection. I used it for that purpose. It was for the purpose of getting off this ground. I used the notes for the purpose of placing my discovery at such a place as I desired. I said that I had never seen the
216 southeast or southwest corners of the Kirby. In making my survey for the Sold Again, I tied to the southeast corner of the Kirby by calculation from the official survey; that is, from Mr. Loring's survey. I never saw the stake on the ground; I wish I

had, but I never did. I looked for it; it may have been there, but I never found it; looked for it something over a year ago last summer. I looked for it with two other men from Colville; could not find it with a pocket-compass line, and never found it. That was the southeast corner of the Kirby. I made the survey for the Sold Again about five years ago; I think it was in 1892. I stuck a stake at the point of discovery on the Shoshone, an actual visible stake; put a copy of the location notice on it. Did it personally. I did it by survey running from the southwest corner of the Last Chance. I have not a copy of my notes of that survey, because I did it mostly by calculation and ran from those lines. I had surveyed all these points previously. It was by actual measurement from the Last Chance corner, corner No. 4, I think. I have notes of the location: South 80 degrees west 147 feet.

Being asked to connect the point of discovery on the surface with the underground work, vertically, and name the particular point where the discovery was made underground, the witness, pointing to the map, said: It is this point right here on the map. I am willing to swear that ore will be found at a point directly under the point of discovery as marked on the surveys. I got the point on the surface. I made the survey from a point called the
217 Sweeny tunnel until I reached the surface. From there connected with the Last Chance corner No. 1. I used my own surveys. I was acting in the capacity of a citizen of the United States. I conveyed the property to the Shoshone Company shortly after locating it. It was less than a month. I had been manager of the Last Chance Mining Company, but, if I recollect right, I was not at the time I made the location.

To the question how he came to go through the workings of the Last Chance, objection was made, overruled, and an exception allowed. Witness answered: I was permitted to do so.

Upon being asked: How long after the location did you get to work for the company again? he answered: About seven months ago.

Have been the consulting engineer for the Last Chance Company wherever they required me. Have not worked for them continuously, but only as they had occasion to use me. Had no regular connection with them. The location was made on a vein. I think it was called the Wardner zone or vein. It was the same vein upon which the Last Chance has worked for years.

Whereupon the following proceedings were had:

Q. Where is the apex of that vein in the Last Chance?

Mr. HEYBURN: Objected to as immaterial.

Objection overruled.

(Counsel argues.)

218 The COURT: He must show that that particular vein is a part of the vein. The apex is within the limits of some other claim. Let me illustrate what I mean: This vein between these end lines. Now, then, another party is the apex; that book repre-

sents the claim. The vein in it cuts off into this ground. This party is entitled to that between these end lines. Now, then, another party comes down and discovers that same vein on his dip. He undertakes to go above and locate that vein. If he proposes to show that this vein that he has discovered down here is a part of the vein that belongs to the Last Chance, I think he can show it. They must show that their discovery down here is upon a part of the vein which belongs to the Last Chance? If they don't show that, their testimony amounts to nothing. It does seem to be outside of the Last Chance mine. Well, I will not say. For the present, I will allow you to introduce that testimony.

Q. You may say if that is the same vein that was intended to be located on——

Mr. HEYBURN: What is that? Repeat that question.

Q. When you made that location underground, that discovery you speak of as the basis of the Shoshone location, was it made on the same vein that passes down through the Last Chance?

Mr. HEYBURN: We will admit that fact of record.

The COURT: Made on the same vein?

Mr. HEYBURN: Yes, after it leaves the Last Chance side line to the south.

219 Q. Is it the same vein which apexes in the Tyler?

Mr. HEYBURN: That raises the old question, and would open up a controversy here which we have gone through. We never have admitted, and never will admit, that that apexes in the Tyler. We will admit that it is that vein, save all that trouble.

The COURT: That ought to cover the point of law that I have in mind.

Q. Is it the same vein that passes through the Stemwinder?

Mr. HEYBURN: We object.

Q. Well, I will stop there. We will try that case when we get to it. I shall insist on my question as to the Stemwinder.

Mr. HEYBURN: That is a lawsuit of the future, and I think we had better try it when we reach it.

The COURT: The question on which the counsel desires to raise the point of law is whether or not this alleged discovery underground there is upon a ledge which crops out in any other mining claims, or has its apex in any other claims. I am aware that requires a good deal. I think we will stop where we are. There has been an admission that it is on the same general ledge that goes through the country there. I can't undertake to inquire into all those claims.

Exception.

Witness continued: There is about 40 or 50 pounds of clean ore at the point of discovery underground, first-class ore. The
220 work from which I made the connection extends to that point underground. I came in through the Sweeny tunnel.

is on the Sweeny tunnel level; a branch of the tunnel runs to it; e branch leaves the tunnel practically at the south side line of e Last Chance claim. We approached through ore about 50 feet efore we arrived at the discovery point. The ore was lying in nches all along. It was in a vein. It was a portion of the Last ance vein, outside of their lines.

At this time defendant offered in evidence a deed from W. C. iller to the Shoshone Mining Company, which was received in idence and marked Defendant's Exhibit No. 5.

Whereupon EDWARD SULLIVAN was called on behalf of defend- t, and testified:

Reside at Wardner Junction. I was one of the locators of the lith quartz claim.

Examining the location notice of the Edith, witness testified that was the claim which he helped to locate. In locating the Edith made a discovery and staked the ground according to law, and t up the discovery and the end stakes one day; that is, the south d, and then we finished them up the next. We never intended abandon the Edith claim. I afterwards became one of the loca- s of the Kirby claim. It covered about the same ground. The ints of discovery are about 100 feet apart. We never made what eally call a discovery on the Kirby ground. We never found any ledge on that ground. We had iron in a cut on the Edith, a kind of mineralized stuff there. It was about 150 feet from where the notice was posted on the Kirby. I did t know Jack Smith; never spoke to him in my life until last ght. We had an official survey made of the Kirby. I was the ner of it at that time.

To the question, Did you instruct Mr. Loring to draw in the ner of the Kirby claim? objection was made, overruled and an ception allowed.

I think I authorized Mr. Spaulding to have Mr. Loring draw in e corner.

Objected to by plaintiffs, objection overruled, and an exception owed.

Don't think I was on the ground after the corner was drawn in. lon't think there was any evidence of a ledge on the Kirby ound. Our object in locating it was to get more ground.

Cross-examination:

I left Wardner in the fall of the Spokane fire in 1889. Have not en back there since. I went to Spokane; remained four or five nths and went up on the Spokane & Northern; remained about five ix months I was sawing in a saw-mill there. From there I went to itish Columbia—Nelson and Kaslo. Have been prospecting and rking in a saw-mill. I claim to know a mineral vein if I find it. found nothing on the Kirby that I call mineral. I made the ation. It was the ground we were after. We located it to make

some money out of it if we could. We found a little strata
222 of mineral on the Edith. There was iron there; don't know whether you would call it a vein or not; it was mineral-bearing rock. At that time I did not know a great deal about prospecting. It was good enough to locate on, that was all. We put up a location notice when we located the Kirby. I think it was on a stump. I helped to post the notice; whether I wrote it or not I could not say. We put a box over it. We did the work there the first year; I know where it was done. It was done in this place where I saw there was a little mineral; it must be 150 feet from where we put up the notice to where we did the work, maybe 200 feet, facing up the hill; the notice would be to the left of the cut. We had no reason for posting a notice at a point different from where we made the discovery. We were after the ground, and, not being very well posted, thought it would make no difference. I think Jacob Johns and Jim Day were there when we posted the notice. We marked the Kirby ground, put up stakes. I don't think we used any of the Edith stakes in marking. In setting the stakes to the lower end of the claim we set them outside of the Edith stakes. We did not use the Edith stakes in marking. The new ground that we wanted to take in was on all sides of the Edith. We took the ground in over the hill on the west. I think we took some on the sides. I think the Edith is either four or five hundred feet wide, probably five. It was not a full-width claim.

Upon further cross-examination the witness testified that he would not like to say whether the Kirby or the Edith was
223 the wider, but said, I know that we took in ground on the west. We took in two or three hundred feet of ground beyond the Edith end stakes on the west. We did not adopt the Edith stakes on the east end of the claim. They are not the same; we set up separate stakes on the east. The witness, upon being asked if he was sure of that, said, I think so.

Being further questioned as to the identity of the Edith and Kirby posts on the east side, he said: They are not the same posts. I think Mr. Johns and Mr. Day were with me in locating. Do not recollect Mr. Smith or Mr. Rutter going with me at any time over the ground. Never showed the claim to Mr. Rutter, I remember the time when he was trying to buy an interest. Don't think I went on the ground with him; that is, not around the boundaries. He bought an interest of me. I would not be sure whether I showed him the boundaries of the claim or not. If I called his attention to th discovery point of the Kirby, it was standing in the town of Wardner; never went on the ground with him; don't remember of seeing Rutter on the ground in 1886. I worked on the ground from four to six weeks in 1886. Put in three or four sets of timbers in rock-work. Started to tunnel. The tunnel was started a little below the point of discovery; that is, the Edith discovery, probably 100 feet below. We never intended to abandon the Edith location. We did the assessment-work on the Edith ground and Kirby ground. Suppose we intended it for the Kirby ground because there was more

ground there. We had other work done there in sinking a shaft, which was the discovery of the Edith.

224 Whereupon W. L. SPAULDING was called on behalf of defendant and testified:

I know the Kirby ground. I was once in possession of the ground by virtue of a bond. I employed Mr. Loring to make an official survey, as requested by the owners, Mr. Rutter and Mr. Sullivan—the same Mr. Sullivan that was just on the witness stand. I had the survey made. I was directed by the owners of the claim. It was understood I should go ahead and make the survey for a patent. The authority was understood. It was one of the conditions of the bond.

In answer to the question, Have you that bond? witness answered: It is somewhere around, but I could not find it. I have made diligent search for it. Mr. Loring made that survey under my instructions.

Being shown a plat marked Defendant's Exhibit "Q," witness states that Mr. Loring gave him that plat as the result of his survey.

I was in possession of that property from March, 1889, to July, 1892. It was during that time that I had the survey made. Mr. Loring and myself had the order for survey fixed up. I don't know whether Mr. Rutter had anything to do with it or not.

Cross-examination:

I was in possession of that ground from March, 1889, to July, 1892. I was working on the ground. I quit in July, 1892.

225 The survey was made in 1889. I was there when the survey was made, but was not with Mr. Loring. We consulted about making it. The matter of the lines was left to Mr. Loring. We talked about drawing in the lines and the best way of paralleling the lines, Mr. Loring and I. After he had completed the work he gave me the plat of it. I sent a man up there to work on the property in the fall of 1891. That was assessment-work. That was on the Kirby. I was in possession of the Kirby mine. Sullivan and Rutter claimed to own it.

Whereupon C. M. FASSETT was called on behalf of defendant and testified:

I am an assayer. Reside at Spokane. Have been in business over ten years. I was on the Kirby ground on the 8th day of this month. I know the tunnel in question. Made an examination of it. Went there for the purpose of taking samples. I made a careful examination of it; took five samples. I have the pulp samples now. I examined that portion of the work in which ledges are claimed to exist. Took samples from them. I found slight traces of silver in three of the samples I took, and no traces in two of them, and no lead in any of them. The traces were very small particles, too small to handle conveniently, that is to say. None of them would weigh more than .2 of an ounce, possibly not more than

.1. Most all of the country rock around there yields silver in small quantities. I don't know the legal definition of a ledge. I did not see anything there that I would consider a ledge of valuable mineral. I have five of the pulp samples.

226 Cross-examination:

I am not a miner. Am not familiar with the legal term "a ledge." Never worked in a mine. I got the samples from the only evidence of a vein that I was able to find. John Pressley was with me, but I found the seams myself. I did not see anything in the filling of those seams that would lead me to think there was material in them other than the material on which the surrounding rock was based. Two of the samples consisted almost entirely of the country rock. They contained a trace of silver. The winze was country rock, almost entirely country rock, from the top to the bottom.

Whereupon PAT. CAREY was called on behalf of defendant and testified:

I reside at Wardner. My business is mining. I am a miner. I have been mining about nineteen years, mostly in Colorado, New Mexico, and Idaho; have been mostly in silver and lead mines. Am a prospector. Prospected several summers. Have examined the discovery of the Kirby claim. I did not find any evidence of mineral at the discovery. The last time I was there was about the 18th or 19th of this month. I examined the tunnel throughout. Saw no crevice to examine. Saw a slip in the rock as I call it. I saw no evidence of mineral-bearing rock. I do not consider that there was any ledge there.

On cross-examination Mr. Carey testified that he saw no evidence of any vein or ledge in the tunnel.

227 Whereupon JOHN CONLEY was called on behalf of defendant and testified:

Reside at Wardner. Am a miner. Have been so engaged since 1885. Have prospected two summers. Acquainted with the discovery tunnel on the Kirby claim; have been there twice. Have examined it. Can see nothing there that I would call a ledge.

Cross-examination:

Have been working in that camp since 1885. I prospected some. Am at present working in the Last Chance mill. Saw no evidence of a vein or ledge in the Kirby tunnel.

Whereupon J. E. Boss was called on behalf of defendant and testified:

Reside in Spokane. My business is mining and operating mines. Have been in that business over ten years in Idaho, British Columbia, and Colorado. Am acquainted with the mines and mineral conditions in the Yreka mining district. Have examined what is called the discovery tunnel of the Kirby location. Made the examination about the 3d or 4th of this month. Examined it for the

purpose of determining whether there was any mineral-bear-
228 ing rock there. I did not find any mineral-bearing rock. Found slips, clay, seams, and country formation—quartzite. Found no ledges, fissures, or veins. I took samples from that tunnel, sampled the winze and incline, the air tunnel, east and west cross-cut, and also took a sample from the first point 15 or 20 feet from the mouth of the tunnel. Had five general samples, large ones that would run 25 or 30 pounds each. I took very thorough samples from the east and west cross-cut on the main tunnel in about 90 or 100 feet. The result was a very small trace in two, none in third, a small trace of silver and no lead. I have the original certificate of assay here. I had them assayed by Mr. Fassett. They were numbered. No. 1 came from the drift running off from the bottom of the incline. I brought it to the surface, cut it down, put it in a sack and sealed it, kept it in my possession until I reached Spokane, delivered it to Mr. Fassett. No. 2 came from the top and bottom of the incline.

In answer to the question, What incline? witness explains: From the head of the tunnel going down to the drift about 50 feet deep. I did the same with that sample and with all of them; that is, I took the precaution to keep them separate. No. 3 comes from the east and west drift of the main tunnel in about 90 feet. That is what Mr. McDonald describes as a large ledge. No. 4 came from the cross-cut to the head of the tunnel; that is where the winze starts to go down. No. 5 starts in about the second or third set of timbers; I should say fourteen or fifteen feet from the mouth of the tunnel. Mr. Fassett gave me a certificate of the result.

229 Certificate offered in evidence, admitted and marked Defendant's Exhibit No. 6, and is as follows:

DEFENDANT'S EXHIBIT No. 6.

Member American Chemical Society.

Member American Institute Mining Engineers.

(Original.)

Charles M. Fassett, assayer and analytical chemist.

Memorandum of Assay of —, Made for J. E. Boss.

SPOKANE, WASHINGTON, *May* 6, 1897.

Assay value per ton of 2,000 pounds avoirdupois.

Sample mark, —.

Copper at — cts. per lb. Lead at — per lb. Silver at — cts. per oz.

	Per cent.	Dollars, cts.	Per cent.	Dollars, cts.	Ounces, 10ths, dollars.
No. 1			None		Trace.
No. 2			None		No trace.
No. 3			None		Trace.
No. 4			None		No trace.
No. 5			None		Trace.

(All samples saved for one year. Pulps can be had from these samples for check assays, at any time.)

No. 12572. C. M. FASSETT.

Charges $15.00.

230 Whereupon N. E. LINDSAY was called on behalf of defendant and testified:

I reside in Spokane, Wash. My business is mining. Have been engaged in that 31 years. Have done most all kinds of mining, milling, and assaying in Montana, Idaho, Utah, Mexico, British Columbia, and Washington. I am fairly familiar with metallurgy and assaying, with milling, but not smelting. I went to quartz mining in 1870, in Utah in Ophir cañon; connected there with the Pioneer mill several years and afterwards the Ontario people, and later went to Idaho. I was running a mill for the Ontario people; afterwards had control of the Ram's Horn mine in Idaho for about three years. I examined the Kirby claim about the 20th of this month. I was requested to go there and see if I could find any mineral veins in their works. I did not find any. I took no samples; examined with the hammer and —. I examined it foot by foot along, by breaking off points of rock and digging into the clay seams, etc.; was looking for mineral-bearing rock. I found some clay seams, probably made by a movement of the earth's crust crushing the rock, filled with material I should presume of the same that the rest of the vein was, only it was crushed; it was clay. I should say that there was no mineral-bearing vein there, or any evidence of ore that would justify calling it mineral-bearing rock.

231 Cross-examination:

I did not find veins there. Veins are generally filled with some matter that is different from the formation. I think the matter in the seams was about the same as the general formation. I did not consider it a vein at all. I call them clay seams, openings in the rocks. It seems to be the same as the rocks and ground around it. We had a great deal of barren ground in the Ram's Horn, where I was manager, and only practically barren ground there, but it was not filled with formation; it was filled with vein matter that was entirely different from the formation. The matrix that filled the vein was the same that carried the ore generally; it was carbonate of iron chiefly. I did not see any quartz in these seams in the Kirby; the color of the filling was very little different from the surrounding country, except where the water had percolated through; it was colored a little with manganese and iron, only from the action of the water. I found no vein 2½ feet wide. I found where they had run a cross-cut on the loose portion of the vein, seemed to have been removed, and showed clay seams along; seemed to be from a foot to two feet wide. I might call it a slip or anything you mind to; showed that there had been a land movement. There were no walls there. I don't call it a mineral-bearing vein; I don't call it a vein. It might have been different from the surrounding rock

when it came to analyzing it, but apparently it was the same.
232 I think it was the same. I did not notice any quartz in it. My judgment is, that there is no mineral-bearing vein exposed in that work. I saw nothing there that miners would usually follow, unless it were contiguous to some large ore body; then there is always a great deal of dead work done in exploring for ore bodies—blind work. I mean if it were contiguous to a valuable ore body or developed mine, already shown to be a mine, then there would be probably enough to justify a prospector trying to find something. My opinion is that there was work enough done there to justify their dropping the matter.

Redirect examination:

I saw nothing in these works that I would spend money on in an attempt to follow it.

Recross-examination:

I have spent a good deal of money prospecting. Have been a little cautious and have had some experience.

Whereupon JAMES H. BUSKETT was called on behalf of defendant and testified:

Reside at Helena, Montana. Am an assayer and chemist. Have been in the business between ten and eleven years. Have
233 connection with mines, mills, and smelters. I was employed in the Elk Horn mine lead smelter at Great Falls, the Anaconda Smelting Company, the Parrott Smelting Company, the Bimetallic Smelting Company. Am familiar with the process of analyzing and assaying ores. Have made an examination of what is called the discovery tunnel of the Kirby mine. Made it day before yesterday. I went up in the morning and saw it, and went up in the afternoon and took samples. I took samples from what I understood to be the vein as described in the notice. It might be called a drift. I took a sample from the bottom of the winze, from a clay seam; took another between the cross-cut and collar of the winze, and another from a point near the mouth of the tunnel. I had with me three large ore sacks. I scraped everything away from the face of the drift, spread two of those sacks down, and then I picked promiscuously from the face that was covered up, and nothing was taken except what was lying on the sacks. Both faces were sampled the same way, and the two samples were mixed; I just made one sample of it. I was not at all partial; I just picked, as I say, promiscuously. I assayed them for silver and lead. In three of them there was nothing; in the other one I got a slight trace of silver, no lead.

Cross-examination:

No, sir; I got no lead. I took the samples right from the face in the solid formation. I did not touch the walls at all. Those
234 seams are rather difficult to get at. I sampled those clay seams, but this large sample was taken right clean from face.

That was as you go in the tunnel from what I understood from the notice I saw there claimed as a vein, and runs at right angles to the tunnel. I presume it is the one where the drift is. Yes, it is where they drift each way. That is where I took my large sample. There is a notice there, "Application for a patent." It is posted in a box; that would be about 40 or 50 feet in from the mouth of the tunnel. I took a sample also further back which had absolutely nothing in it. The sample from the drift had nothing in it. The sample which carried a trace was taken from a small slip between the vein and the collar of the shaft. The slip is very small, probably the width of my thumb. I sampled on the left hand side of the tunnel as we were going in, also from the roof.

Whereupon CHARLES SWEENEY, called on behalf of defendant, testified:

Am acquainted with the Shoshone mining claim. There was about 100 feet of development work done on that claim in 1895, which cost somewhere in the neighborhood of $1,500. It was done in the discovery tunnel, running west. The work for 1896 was a further prosecution of work on the same ground, probably 25 or 30 feet; it cost five or six hundred dollars. That was going west from the discovery.

At this time defendant, by its counsel, renewed the offer of the affidavits made by F. W. Bradley, relative to the ownership of the Kirby claim, which affidavits are as follows:

235 *Notice of Assessment-work on Mining Claims.*

Notice is hereby given to all whom it may concern that the Bunker Hill and Sullivan Mining and Concentrating Company has during the year 1896 expended for underground development work in the Bunker Hill and Sullivan group of mines the sum of over $50,000.00, and claims that such expenditure was made for the direct purpose of developing and holding according to law all the following adjoining and contiguous mining claims which are worked together as one group, and claimed by the Bunker Hill and Sullivan Mining and Concentrating Company:

Ollie McMillan.	Matabeleland.
Miners' Delight.	Allie.
Zuzuland.	Helen Marr.
Richmond.	Cypress.
No Name.	George Arnett.
Sullivan Extension.	Butternut.
Blue Bird.	Josie.
Offset.	Grant.
Sarnie.	Hemlock.
Mabundaland.	Scoffield.
Rookery.	Whoop Up.
Kirby Fraction.	Buckeye.
Fraction.	B. W. Fraction.

Bulah.
South.
236 Essex.
Homestake.
Silver.
Sancho Fraction.
Iron Hill.
Harris.
Maple.
Bullion.
Stemwinder Fraction.
Stopping.
Krouger.
La Crosse.
W. H. Fraction.
Ben Herr.
Spruce Fraction.
Sullivan Fraction.
Bonanza Fraction.
Alla.
Overlap.
S. Aspen.
Bought Again.
Tamarack.
East.
Mashonaland.
Triangle Fraction.
Miles.
Hickory.
African Reef.
Johannesburg.
Summit.
Stemwinder.

BUNKER HILL & SULLIVAN MINING AND CONCENTRATING COMPANY,
By F. W. BRADLEY, *Manager.*

We, the undersigned, on the 2d and 3d days of December, 1896, have posted a copy of this notice on each of the above-mentioned mining claims.

LLEWELLYN LLEWELLYN.
GEORGE A. SONNEMAN.

Recorded at the request of F. W. Bradley, Dec. 7th, 1896, at 9 o'clock a. m.

BARRY N. HILLARD,
County Recorder,
By JOHN P. SHEEHY, *Deputy.*

237 *Proof of Labor.*

STATE OF IDAHO, }
County of Shoshone, } ss:

Before me, the subscribed, personally appeared F. W. Bradley, who, being first duly sworn, says that he is the agent for the Bunker Hill and Sullivan Mining and Concentrating Company, and that during the year 1896 at least $50,000.00 has been expended for underground development work in the Bunker Hill and Sullivan group of mines, which consist of the following lode mining claims:

Ollie McMillan.
Miners' Delight.
Zuzuland.
Richmond.
Fraction.
Bulah.
South.
Whoop Up.
Buckeye.
B. W. Fraction.
No Name.
Sul-ivan Extension.
Blue Bird.
Offset.

	Matabeleland.	Sullivan Extension.
	Allie.	Bonanza Fraction.
	Helen Marr.	Essex.
	Cypress.	Homestake.
	George Arnett.	Silver.
	Butternutt.	Sancho Fraction.
	Josie.	Iron Hill.
	Grant.	Harris.
	Hemlock.	Maple.
	Scoffield.	Bullion.
238	Stemwinder Fraction.	S. Aspen.
	Stopping.	Bought Again.
	Krouger.	Tamarack.
	La Crosse.	East.
	W. H. Fraction.	Mashonaland.
	Ben Herr.	Triangle Fraction.
	Sarnie.	Miles.
	Mabundaland.	Hickory.
	Rookery.	African Reef.
	Kirby Fraction.	Johannesburg.
	Spruce Fraction.	Summit.
	Alla.	Stemwinder.
	Overlap.	

Situated in Yreka mining district, Shoshone county, State o Idaho, and that such expenditure was made for the direct develop ment of the said group of contiguous mining claims at the expens of the Bunker Hill and Sullivan Mining and Concentrating Com pany, owner of said group of mining claims, for the purpose of hold ing all of the above mentioned lode mining claims.

F. W. BRADLEY.

Subscribed and sworn to before me this 4th day of December 1896.

M. J. SINCLAIR,
Notary Public.

Recorded at the request of F. W. Bradley, Dec. 7th, 1896, at 9 o'clock a. m.

BARRY N. HILLARD,
County Recorder,
By JOHN P. SHEEHY, *Deputy.*

239 *Proof of Labor.*

STATE OF IDAHO, } ss:
County of Shoshone, }

Before me, the subscriber, personally appeared F. W. Bradley, who, being first duly sworn, says that during the year 1895 at least $30,000.00 has been expended for underground development work

in the Bunker Hill and Sullivan group of mines, which consists of the following lode mining claims:

	Ollie McMillan.	South.
	No Name.	Essex.
	Sarnia.	Overlap.
	Miners' Delight.	Matabeleland.
	Sullivan Extension.	Homestake.
	Mabundaland.	Aspen.
	Zuzuland.	Allie.
	Blue Bird.	Silver.
	Rookery.	Bought Again.
	Richmond.	Helen Marr.
	Offset.	Sancho Fraction.
	Kirby Fraction.	Tamarack.
	Fraction.	Cypress.
	Sullivan Fraction.	Iron Hill.
	Spruce Fraction.	East.
	Bonanza Fraction.	George Arnett.
	Alla.	Harris.
240	Mashonaland.	Miles.
	Butternut.	Grant.
	Maple.	Stemwinder Fraction.
	Triangle.	Hickory.
	Josie.	Hemlock.
	Bullion.	Bulah.

Situated in Yreka mining district, county of Shoshone, State of Idaho. That such expenditure was made for the direct development of the said group of contiguous mining claims at the expense of the Bunker Hill and Sullivan Mining and Concentrating Company, owner of said group of claims, for the purpose of holding said group of claims.

F. W. BRADLEY.

Subscribed and sworn to before me this 10th day of December, A. D. 1895.

M. J. SINCLAIR,
Notary Public.

Recorded at the request of F. W. Bradley, Dec. 13, 1895, at 9 o'clock a. m.

[SEAL.]

BARRY N. HILLARD,
County Recorder,
By L. A. DOHERTY, *Deputy.*

Notice of Assessment-work on Mining Claims.

Notice is hereby given to all whom it may concern that the
241 Bunker Hill and Sullivan Mining and Concentrating Company has during the year 1895 expended for underground development work in the Bunker Hill and Sullivan group of mines

the sum of $30,000.00, and claims that such expenditure was made for the direct purpose of developing and holding according to law all the following and adjoining and contiguous mining claims, which are worked together as one group, and claimed by the Bunker Hill and Sullivan Mining and Concentrating Company:

	Ollie McMillan.	Overlap.
	No Name.	Matabeleland.
	Sarnia.	Homestake.
	Miners' Delight.	Aspen.
	Sullivan Extension.	Allie.
	Mabundaland.	Silver.
	Zuzuland.	Bought Again.
	Blue Bird.	Helen Marr.
	Rookery.	Sancho Fraction.
	Richmond.	Tamarack.
	Offset.	Cypress.
	Kirby Fraction.	Iron Hill.
	Fraction.	East.
	Sullivan Fraction.	George Arnett.
	Spruce Fraction.	Harris.
	Bulah.	Mashonaland.
	Bonanza Fraction.	Butternut.
	Alla.	Maple.
	South.	Triangle.
	Essex.	Josie.
242	Bullion.	Stemwinder Fraction.
	Miles.	Hickory.
	Grant.	Hemlock.

BUNKER HILL & SULLIVAN MINING & CONCENTRATING COMPANY,
By F. W. BRADLEY, *Manager.*

We, the undersigned, on the 11th to 14th days of December, 1895, have posted a copy of this notice on each of the above-mentioned mining claims.

GEORGE A. SONNEMEN.
WM. S. HARRIS.
LLEWELLYN LLEWELLYN.

Recorded at the request of F. W. Bradley, Dec. 17th, 1895, 2 o'clock p. m.

BARRY N. HILLARD,
County Recorder,
By L. A. DOHERTY, *Deputy.*

Plaintiffs' counsel renewed his objection, which objection was sustained, and an exception allowed.

At this time defendant asks to substitute a clean plat, certified by the surveyor general, for the one before placed in evidence, which was substituted and marked Defendant's Exhibit No. 7.

Thereupon defendant rested its case.

243 *Rebuttal.*

Plaintiffs offer to introduce field-notes of the survey of the Sold Again mining claim, for the purpose of showing when that survey was made and fixing the date, and the court decided to admit in evidence only enough of the notes to show the fact that a pine post 5 inches square, six feet long, set 2 feet in a mound of earth and stones, inscribed "1–933," whence the S. E. cor. the Kirby Fraction lode unsurveyed, W. L. Spaulding and others, claimants, surveyed by W. Clayton Miller, United States deputy surveyor; this being admitted for the purpose of showing that in surveying the Sold Again connection was made with the Kirby.

Whereupon F. C. LORING was recalled in rebuttal and testified as follows:

Mr. Sullivan was present with me on the 22d of July, when I was surveying. No one directed me how to make that survey. I used my own judgment entirely. Mr. Spaulding was not present when I made the actual survey. It was not made by his direction.

In answer to a question by the court, witness said: Mr. Spaulding employed me. He was the only man I knew in the transaction. The work of drawing in the line of the claim was entirely my own, without any one's advice.

244 Cross-examination:

I had to make those lines parallel. I retained the eastern end line. I paralleled the western end line with it. That was done under the direction of the surveyor general.

Whereupon ALBERT BURCH was recalled in rebuttal and testified: I made an examination of the underground discovery of the Shoshone ledge under order of the court. I have a map of the work which I did. I did the work myself. (Witness producing a map says:) The lines in black show the outline of the several claims in the case, the Kirby and Shoshone; also an outline of the Last Chance claim. The Sweeney tunnel, through which the discovery of the Shoshone is approached, is shown in yellow, up to the point which was shown to me by Mr. Miller as the discovery point of the Shoshone.

Witness putting his pencil on the point which was shown him as the discovery point, said: This circle here represents the point that he indicated to me as the discovery point underground. I took Mr. Miller's notes of survey, and from them established the discovery point on the surface. From the point underground given me by Mr. Miller I connected by survey with post 4 of the Last Chance lode, to which his discovery point on the surface was con-
245 nected. In doing that I used Mr. Miller's notes. It did not exactly agree with the statement he made, but I think he gave it from memory. The location post in the ground is about 27 feet southerly from the discovery point underneath, as pointed out by Mr. Miller. I found no stake at that point. There was an old

post lying near there. I saw nothing on it. There was no notice. Underground from the point where we left the Sweeney tunnel, station 3, the tunnel for some distance is closely lagged up on the top and sides. It is impossible to see the ground, but at the point of station 3 we are unquestionably in the foot-wall rock. There is no evidence of any mineral in it at all. Opposite the chute shown here near station 4, a hole was cut, through which showed vein matter, galena, in the rock. I examined the tunnel carefully, and there was no point for more than three or four feet without galena.

Cross-examination:

I made an actual survey to connect the underground discovery with post No. 4 of the Last Chance. We ran from post No. 4 down to the mouth of the tunnel, measured the lines. In running from post No. 4 I ran a transverse line down the hill, and between No. 4 and my first point for setting the foresight gives a variation of 21 degrees and 59 minutes. The backsight gives a variation of 22 degrees and minutes between the next two points. The line
246 was 412.7 feet; steel tip 500 feet long. I contend that the discovery point, as pointed out to me by Mr. Miller, is within the Last Chance line. Mr. Miller told me that 50 feet of that tunnel was claimed as the discovery cut, and counting it that way it would run outside of the Last Chance line.

Whereupon R. J. Rutter was recalled in rebuttal and testified: I went upon the Shoshone ground in 1894 to ascertain where they had planted their discovery post, about the 24th of May or April. Si Hill was with me. We did not find the post or the notice of the Shoshone. I have never seen the Shoshone notice.

Whereupon Josiah Hill was recalled in rebuttal and testified: I accompanied Mr. Rutter in 1894 in looking for the post and notice of the Shoshone. That was in April. Found no notice and no stake, and no indications of location.

Cross-examination:

We heard that there was a location notice on the claim, on the east end of the claim, and we went up there to look. We heard it from somebody that had seen it. I suppose that was before it was torn down. The notice was not torn down when I went there.

247 Redirect examination:

The question was asked: Was the notice there? Mr. Heyburn asked Mr. McBride what notice he alluded to, and Mr. McBride answered, A notice of the Wardner claim.

Recross-examination:

Mr. Heyburn asks witness, Are you talking about the Wardner claim?

A. Yes, sir. I think I went up to look for the Wardner notice. I think the Wardner had been located in 1894.

Redirect examination:

The witness says, I saw a notice on the tree; it was east of the Kirby cut.

Whereupon the court asks, What did you go up there for?

A. Mr. Rutter and myself were told that there was a notice posted on our claim, and we went up to see what it was. We looked all over the claim.

Recross-examination:

There was no snow on the ground at that time.

218 Whereupon J. M. PORTER was recalled in rebuttal and testified:

I was not on the ground in 1894. I was first there in 1895. I was also there in 1896. I saw no post or anything upon which a notice of the location of the Shoshone could be placed. There was a tree there 15 or 20 feet possibly, a dead tree, no marks on it. I examined the ground carefully. There were no stones there, nothing to indicate that a notice had been posted.

Surrebuttal.

Whereupon W. CLAYTON MILLER was recalled on behalf of defendant in surrebuttal, and testified:

I tied the survey of the Sold Again to the southeast corner of the Kirby claim, marked No. 4; there are two southeast corners. It is the one marked No. 4 that Mr. Loring surveyed. It is the corner marked with yellow. In pointing out the discovery to Mr. Burch, I told him our discovery cut was from the northerly drift 50 feet easterly from that point up to the angle, the point he has marked as discovery there. In other words the discovery point was not a point, but a cut, and the location notice was practically vertically over this last point, as near as I could calculate.

Mr. HEYBURN: Let the record show that we have finished the testimony on both sides in the case of Rutter and Bradley
249 against The Shoshone Mining Company; that the case is ready for argument. That the court orders that we proceed to introduce testimony in the case of The Shoshone Mining Company against Rutter and Bradley, involving the controversy between the Ibex and Shoshone claims upon the adverse — filed against the application of the Kirby for a patent.

The plaintiffs protest against the proceeding at this time, for the reason that there is a case pending before the court involving different titles that has not been disposed of.

The court overruled the objection and granted an exception to plaintiffs.

PLAINTIFFS' EXHIBIT "F."

This indenture, made the eleventh day of October, A. D. 1894, between Royal J. Rutter and Ellen L. Rutter, of Kellogg, Shoshone County, State of Idaho, the parties of the first part, and F. W. Brad-

ley, of Kellogg, Shoshone county, State of Idaho, the party of the second part:

Witnesseth, that the said parties of the first part, for and in consideration of the sum of one thousand dollars, lawful money of the United States of America, to them in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, remised, released, and forever quitclaimed, and by these presents do grant, bargain, sell, remise, release,
250 and forever quitclaim unto the said party of the second part, and to his heirs and assigns, all of that certain mining property described as follows, to wit:

An undivided one-eighth ($\frac{1}{8}$) interest in the Kirby Fraction mining claim; said mining claim is located in the Yreka mining district, and is fully described upon the records of Shoshone county, in the recorder's office at Murray, Shoshone county, State of Idaho.

Together with all the dips, spurs, and angles, and also all the metals, ores, gold, and silver bearing quartz, rock, and earth therein; and all the rights, privileges, and franchises thereto incident, appendant, and appurtenant, or therewith usually had and enjoyed; and also, all and singular, the tenements, hereditaments, and appurtenances thereto belonging or in anywise appurtaining, and the *the* rents, issues, and profits thereof; and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said parties of the first part, of, in, or to said premises, and every part and parcel thereof, with the appurtenances. To have and to hold, all and singular, the said premises, together with the appurtenances and privileges thereto incident unto said party of the second part, his heirs and assigns forever.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

ROYAL J. RUTTER. [SEAL.]
ELLEN L. RUTTER. [SEAL.]

251 Signed, sealed, and delivered in the presence of:
G. A. BARNARD.
JOSIAH HILL.

STATE OF IDAHO, }
County of Shoshone, } *ss*:

On this eleventh day of October, A. D. 1894, before me, a justice of the peace in and for said county, personally appeared Royal J. Rutter and Ellen L. Rutter, personally known to me to be the persons whose names are subscribed to the within instrument, and acknowledge to me that they executed the same freely and voluntarily, for the uses and purposes therein set forth.

In witness whereof, I have hereunto set my hand and affixed my official seal at my office in Kellogg, the day — year in this certificate first above written.

GEORGE A. BARNARD,
Justice of the Peace.

(Endorsed:) 1472. ½ Kirby Fraction. R. J. Rutter *et ux.* to F. W. Bradley. Mining claim deed. Dated —, 189–. Recorded at the request of F. W. Bradley, Nov. 22, 1894, at ! o'clock p. m., in Book 7 of Deeds, page 2, records of Shoshone county, State of Idaho. Barry N. Hillard, county recorder, by L. A. Doherty, deputy.

252 PLAINTIFFS' EXHIBIT "M."

Proof of Labor.

COUNTY OF SHOSHONE, } *ss:*
State of Idaho, }

Before me, the subscriber, personally appeared R. J. Rutter, who, being first duly sworn, says that during the year 1896, at least $100 has been expended for underground development work upon the Helen Marr Lode mining claim and that also $100 has been expended for underground development work upon the Kirby Fraction Lode mining claim. These claims adjoin each other, and are situated in Yreka mining district, Shoshone county, State of Idaho. Such expenditures were made at my expense for the purpose of holding said claims.

R. J. RUTTER.

Subscribed and sworn to before me this 4th day of December, 1896.

[SEAL.] M. J. SINCLAIR,
Notary Public.

(Endorsed:) 1472. Proof of labor, Helen Marr lode, Kirby Fraction lode, Yreka mining district, by R. J. Rutter, affiant and owner. Recorded at the request of F. W. Bradley Dec. 7, 1896, at 9 o'clock a. m., in Book "L" of Miscellaneous, page 487, rec-
253 ords of Shoshone county, State of Idaho. Barry N. Hillard, county recorder, by Chas. A. Ervin, deputy recorder.

PLAINTIFFS' EXHIBIT "N."

IN THE UNITED STATES LAND OFFICE,
CŒUR D'ALENE CITY, IDAHO.

In the Matter of the Application of the SHOSHONE MINING CO. for a Patent for the Shoshone and Summit Consolidated Lodes, in Township Forty-eight (48) North, Range Two (2), Boisé Meridian, in Yreka Mining District, County of Shoshone, State of Idaho.

To the register and receiver of the United States land office at Cœur d'Alene city, Idaho, and to the Shoshone Mining Company, applicant aforesaid:

Whereas the Shoshone Mining Co. (applicant), did on the 21st day of August, 1894, as appears from the published notice thereof

hereinafter appended, filed in the district land office of the United States at Cœur d'Alene city in said district, a certain plat of a survey of two certain mining claims and lodes, together with its application for a United States patent for the same, calling the said lodes and claims respectively the Summit Lode and the Shoshone Lode claims, and the "Shoshone and Summit Consolidated lodes," situate in Shoshone county, State of Idaho, in the Yreka mining district thereof, describing the same in a plat and field-notes filed
254 therewith, and said Shoshone Mining Co. did on the 24th day of August, 1895, by a publication of a notice in the "Wardner News," a newspaper, published at the town of Wardner, in said Shoshone county, *did* give notice that it would apply for a United States patent for the premises aforesaid, which notice was as follows:

No. 192.

Application for a Patent.

UNITED STATES LAND OFFICE,
CŒUR D'ALENE, IDAHO, *August* 21, 1895.

Notice is hereby given that the Shoshone Mining Company, whose post-office address is Osburn, Shoshone county, Idaho, has this day filed application for a patent for 1,500 and 535.8 linear feet of the Shoshone and Summit mine or vein, bearing silver and lead respectively, with surface ground 600 and 310 feet in width, situated in Yreka mining district, county of Shoshone, and State of Idaho, and designated by the field-notes and official plat on file in this office as lot No. —, in township 48 north, of range 2 east, of Boisé meridian, said lot No. — being described as follows, to wit:

Shoshone Lode.

Beginning at the discovery of the claim, a fir post 4 x 4 inches square, firmly set, where the notice of location was originally
255 posted, about 1,200 feet vertically over the discovery, which is in a drift in ore 5 x 6 feet, whence the top of an incline shaft 8 x 6 feet, running S. 41 deg. west, 35 feet, bears N. 28 deg. E., 230 feet; thence S. 62 deg. E., 400 feet along the course of the vein, as near as practicable, to the center of the easterly end line, a set post 4 inches square and 4 feet long, 1½ feet in the ground, with mound of earth, and marked E. center end, 1,126; thence N. 41 deg. E., 300 feet to cor. No. 1, identical with N. E. location corner, a set post 4 inches square, 4 feet long, 1½ feet in the ground, with mound of earth and marked 1–1126; thence N. 62 deg. W., 1,000 feet to corner No. 2, a set post 4 inches square, 4 feet long, 1½ feet in the ground, with mound of earth, marked 2–1126; thence S. 18 deg. 13 minutes W., 73.7 feet to corner No. 3, identical with corner No. 4, sur. 615, a set post 4 inches square, 4 feet long, 1½ feet in the ground, with mound of earth, marked 3–1126; thence N. 60 deg. 62 minutes west, 525.5 feet to corner No. —, identical with N. W. location corner of claim, a set post 4 inches square, 4 feet long, 1½ feet in the ground,

with mound of earth, marked 4–1129; thence S. 41 deg. west, 244 feet to center of westerly end line, a set post 4 inches square, 4 feet long, 1½ feet in ground, with mound of earth, and marked westerly center end, 1,126; thence continuing same course, 300 feet further, to corner No. 5, identical with location corner of claim, a set post 4 inches square, 4 feet long, 1½ feet in ground, with mound of earth and marked 5–1126; thence S. 62 deg. E., 1,265.7 feet to corner No. 6, a set post 4 inches square, 4 feet long, 1½ feet in ground, with mound of earth, marked 6–1126; thence N. 87 deg. 50 minutes E.,
256 313 feet to corner No. 7, a set post 4 inches square, 4 feet long, 1½ feet in ground, with mound of earth, and marked 7–1126, whence ¼-section corner between sections 12–13, T. 48 N., R. 2 E., bears S. 70 deg. .05 minutes E., 995.5 feet measured; thence N. 41 deg. E., 138.6 feet to center of easterly end line, and continuing same course, 300 feet further to corner No. 1 and place of beginning, being a survey of the exterior boundary of the Shoshone lode.

Summit Lode.

Beginning at the discovery, a fir post 4 inches square, 4 feet long, firmly set, where notice of location was originally posted, and about 1,200 feet vertically over the discovery in a drift 5 x 6 feet in ore; thence S. 62 deg. E., 120 feet along the course of the vein, as nearly as practicable, to the center of the easterly end line of claim, a set post 4 inches square, 4 feet long, 1½ feet in the ground, with mound of earth, and marked E. center end, 1,126; thence N. 41 deg. E., 30 feet to corner No. 8, identical with location corner of claim, a set post 4 inches square, 4 feet long, 1½ feet in ground with mound of stones, and marked 8–1126; thence N. 3 deg. 33 minutes E., 210 feet to corner No. 9, identical with location corner of claim, and with corner No. 1, of survey No. 551, a set post 4 inches square, four feet long, 1½ feet in ground, with mound of earth, and marked 9–1126; thence N. 62 deg. W., 301.8 feet to corner No. 11, identical with location corner of claim, a set
257 post 4 inches square, 4 feet long, 1½ feet in ground, with mound of earth, and marked 11–1126; thence south 41 deg. west, 300 feet to center of westerly end line, a set post 4 inches square, 4 feet long, 1½ feet in ground, with mound of earth, and marked W. center end, 1,126; thence continuing same course, 10 feet further to corner No. 12, identical with location corner of claim, and with corner No. 2 of this survey, a set post 4 inches square, 4 feet long, 1½ feet in ground, with mound of earth, and marked 12–1126; with S. E. location corner of claim, a set post 4 inches square, 4 feet long, 1½ feet in ground, with mound of earth and marked 13–1126; thence N. 41 deg. E., 40 feet to corner No. 8, and place of beginning, being a survey of the exterior bundaries of the Summit lode.

Area of Summit lode	3.131 acres.
Net area of Shoshone lode	17.744 acres.
Net area of claim, sur. 1126	29.875

Magnetic variations at 21 deg. 30 minutes east.

The location of this mine is recorded in the recorder's office of Shoshone Co., in the Book "N" of Quartz Locations. The adjoining claimants are "Sold Again Fraction" lode; the Bunker Hill and Sullivan Mining and Con. Co., claimants; the Last Chance lode, Last Chance Mining Co., claimants; Skookum lode, claimants unknown.

Any and all persons claiming adversely any portion of said Shoshone and Summit Consolidated lodes, mines of surface ground,
*are required to file their adverse claims with the register of
258 the United States land office at Cœur d'Alene, in the county of Kootenai, State of Idaho, during the sixty days' period of publication hereof or they will be barred by *the* virtue — the provisions of the statute.

JAMES GRAHAM, *Register.*

First published, August 24, 1895.

Whereas, the first publication of said notice in said newspaper was made on the 24th day of August, 1895, in said "Wardner News," a weekly newspaper published at Wardner, as aforesaid, in said State.

Now, therefore, I, J. R. Rutter, a citizen of the United States, over the age of twenty-one years, residing in and my post-office address being Wardner, in the county of Shoshone, State of Idaho, do now on this 22d day of October, 1895, on behalf of myself and my co-owner, F. W. Bradley, enter this my protest and adverse claim against the issuing of a patent to the said Shoshone Mining Co., upon its pretended claim upon the said Shoshone lode or the said "Shoshone and Summit Consolidated lodes," as set forth in its said plat and field-notes as aforesaid, for the following reasons, to wit:

(1.) The surface ground and veins or lodes contained therein, as set forth and described in the plat and field-notes of the said Shoshone Mining Co., or a great portion thereof, are not the property of the said applicant, neither is it entitled to hold the same under or by virtue of the local laws, rules and customs of miners
259 in said mining district, the laws of the State of Idaho or the statutes of the United States relating to mining claims.

(2.) Because a great portion of the premises described in said plat and notice of said applicant, and claimed by it as the so-called Shoshone and Summit Consolidated lodes, is claimed adversely, and is owned by this protestant as the "Kirby" Fraction lode, as will appear by reference to an abstract of title herewith filed, made a part of his protest and marked Exhibit "A."

(3.) Because this protestant, his co-owner, and his grantors have held, occupied and possessed a great portion of the premises set forth and described by the said Shoshone Mining Co. in its plat and notice of the so-called Shoshone and Summit Consolidated lodes long prior to the pretended discovery and location of the so called Shoshone and Summit Consolidated lodes; such occupation and possession of this protestant, his co-owner and his grantors, having been

under and by virtue of a full compliance with the local laws, rules, and customs of said mining district, and the laws of the State and of the United States pertaining to mineral lands.

(4.) Because this protestant, his co-owner and his grantors, have held, occupied, and possessed all that portion of the so-called Shoshone and Summit Consolidated lodes, as represented on the plat of a survey made by James M. Porter, deputy United States mineral surveyor, and marked in red, said plat of said survey being herewith filed, marked Exhibit "B," and made a part of this pro-
260 test, and have held, occupied, and possessed the same long prior to the pretended discovery and location of the so-called Shoshone and Summit Consolidated lodes, and are the *bona fide* purchasers for a valuable consideration from or through the original discoverers and locators of said "Kirby" Fraction lode by conveyances as shown on said abstract.

(5.) Because a valid discovery, location, and record of said Kirby Fraction lode was made by the grantors of this protestant and his co-owner in strict compliance with said local laws, rules, and customs, and the laws of the State of Idaho and of the United States, and while the same was vacant mineral land of the United States, open to occupation long prior to any pretended discovery of location thereof by said Shoshone Mining Co., or its grantors, and said Kirby Fraction lode hath been occupied and possessed as aforesaid ever since its discovery as aforesaid by the grantor of his protestant and his co-owner, under and by virtue of such discovery, location, and record.

Therefore this protestant enters this protest and adverse claim on behalf of himself and his co-owner, F. W. Bradley, against the issuance of a patent to the said Shoshone Mining Co. for its said claim, to wit, the Shoshone and Summit Consolidated claims.

(Signed) R. J. RUTTER.

261 STATE OF IDAHO, } *County of Kootenai,* } ss:

On this 22d day of October, 1895, before me, the subscriber, a notary public in and for the said county and State, personally appeared the above-named R. J. Rutter, who, being first duly sworn, sayeth that he is one of the adverse claimants named in the foregoing protest and adverse claim above subscribed by him; that he has read the same and knows the contents thereof; that the same is true in substance and fact, and that the said adverse claim is made in good faith and to protect his better and prior title.

(Signed) R. J. RUTTER.

Sworn and subscribed before me this 22d day, 1895.

[SEAL.] JAMES H. HARTE,
Notary Public.

EXHIBIT "A."

Abstract of title to the "Kirby Fraction" lode and mining claim, Yreka mining district, county of Shoshone, State of Idaho.

262

1.

Notice of Location.

James Day, Jacob Johns, Ed. Sullivan, Elar Charlebois, locators.	Dated July 11, 1886; recorded (district recorder's office) July 13, 1886; recorded (county recorder's office) September 8, 1886, Book "E," page 161.

Description.

Locating and claiming 1,400 linear feet of this vein or lode, with surface ground 400 feet in width situated in Yreka mining district, county of Shoshone, and known as the Kirby Fraction quartz mining claim, and being on the west slope of Milo creek, one-half mile west of Wardner, bounded on the north by the Last Chance lode and on the east by what is known as the Emma lode.

2.

Deed.

James Day, Ed. Sullivan, Jacob John, Elar Charleboise (grantors) to R. J. Rutter (grantee).	Dated April 2, 1887; recorded April 7, 1887, Book "M," page 124; consideration, $150.00,

263

Description.

An undivided one-half interest in and to that certain lode and mining claim known as and called the "Edith" and "Kirby" claims, situate, lying and being on the west slope of Milo creek, bounded on the north by the Last Chance and on the east by what is known as the Emma lode, about one-half mile west of Wardner, in the Yreka mining district, Shoshone county, Idaho Territory.

Duly acknowledged before H. F. Gude, justice of the peace, Shoshone county, Idaho Territory.

3.

Deed.

James Day (grantor) to R. J. Rutter (grantee).	Dated June 1, 1887; recorded June 7, 1887, Book "M," page 579; consideration, $200.00.

Description.

An undivided one-eighth (1/8) interest in and to that certain lead, lode, or mining claim known as and called the "Edith" and

"Kirby" quartz claim, situate, lying, and being on Milo gulch, and bounded on the west by the Stemwinder quartz claim, and on the *west* by the Last Chance, in Yreka mining district, Shoshone county, Idaho Territory.

264 Duly acknowledged before H. F. Gude, justice of the peace, Shoshone county, Idaho Territory.

4.

Deed.

Jacob Johns, Elar Charleboise (grantors) to R. J. Rutter (grantee). } Dated May 17, 1887; recorded June 7, 1887, Book "M," page 581; consideration, $400.00.

Description.

An undivided two-eighths ($\frac{2}{8}$) interest in and to that certain lead, lode, or mining claim known as and called Kirby and Edith, situated, being, and lying on the south side of Milo gulch, and bounded on the west by the Last Chance mining claim, and on the north by the Emma mining claim, in the Yreka mining district, Shoshone county, Idaho Territory.

Duly acknowledged before H. F. Gude, justice of the peace, Shoshone county, Idaho Territory.

5.

Notice of Intention to Hold and Work Mining Claim.

Royal J. Rutter (claimant). } Dated November 18, 1893; recorded Nov. 27, 1893, Book "J," page 536.

265 Description.

Notice is hereby given that the undersigned, one of the owners of the "Kirby" mining claim, situated in the Yreka mining district, Shoshone county, State of Idaho, being desirous of taking the benefit of act of Congress entitled "An act to amend section 2324 of the Revised Statutes of the United States, relating to mining claims, approved November —, 1893," hereby declare that I, in good faith, intend to hold and work said claim.

6.

Co-owner Notice.

R. J. Rutter to Eugene Sullivan. } Dated January 14, 1893; recorded August 20, 1894, Book "K," page 287.

Description.

You and your representatives and successors in interest are hereby notified that the undersigned, your co-owner, in accordance with the laws of the United States, has expended in labor upon the

Kirby quartz mining claim, situated in the Yreka mining district, Shoshone county, Idaho, the sum of one hundred dollars as assessment-work for the year 1892, and you are hereby notified that unless you contribute your proportion of said expenditure, amounting to $12 50, together with the cost of this publication, within
266 the statutory time, your interest in said mining claim will become the property of the undersigned.

Attached to said notice is the affidavit of J. S. Langrishe, publisher of the "Cœur d'Alene Barbarian," a weekly newspaper published at Wardner, Idaho, that said notice was first published in said newspaper in its issue dated January 14, 1893, and was published in each weekly issue of said newspaper for three months thereafter, the full period of ninety days, the last publication thereof being in the issue dated May 6th, 1893.

7.

Notice of Intention to Hold and Work Mining Claim.

Royal J. Rutter (claimant). } Dated Nov. 5, 1894; recorded Nov. 5, 1894, Book "K," page 371.

Description.

Giving notice that the undersigned, owner of the Kirby mine, located in Yreka mining district, Shoshone county, Idaho, being desirous of taking the benefit of the act of Congress, entitled "An act to amend section 2324 of the Revised Statutes of the United States, relating to mining claims, approved July 18, 1894," hereby declare that I, in good faith, intend to hold and work said mining claim.

267

8.

Deed.

Royal J. Rutter, Ellen L. Rutter (grantors) to F. W. Bradley (grantee). } Dated October 11, 1894; recorded Nov. 22, 1894, Book 7, page 2; consideration, $1,000.00.

Description.

An undivided one-eighth (1/8) interest in the Kirby Fraction mining claim; said mining claim is located in the Yreka mining district, and is fully described on the records of Shoshone county, in the recorder's office, at Murray, Shoshone county, State of Idaho.

Duly acknowledged before George A. Barnard, justice of the peace, Shoshone county, State of Idaho.

9.

Notice of Intention to Hold and Work Mining Claim.

F. W. Bradley (claimant). } Dated December 17, 1894; recorded Dec. 19, 1894, Book "K," page 551.

Description.

268 Giving notice that the undersigned, owner of the (together with other properties) Kirby Fraction lode and mining claim, situate in Yreka mining district, Shoshone county, State of Idaho, being desirous of taking the benefit of the act of Congress entitled "An act to amend section 2324 of the Revised Statutes of the United States, relating to mining claims, approved July 18, A. D. 1894," hereby declares that he in good faith intends to hold and work said mining claim.

STATE OF IDAHO, } *County of Shoshone,* } ss:

I, Barry N. Hillard, county recorder in and for Shoshone county, do hereby certify the foregoing abstract of title, from item number one to item number nine, inclusive, to be a true and correct abstract of title to said property, as the same appears upon the records of said Shoshone county, on this the 5th day of October, A. D. 1895, at 3 o'clock p. m.

In testimony whereof I hereunto set my hand and affix my official seal at Murray, the day and year in this certificate last above written.

[SEAL.] (Signed) BARRY N. HILLARD,
County Recorder.

(Diagram representing the conflict claimed to exist between Shoshone lodge and the Kirby lode, as surveyed by James M. Porter, U. S. dep. min. sur. Said diagram*ing* designated as Exhibit "B.")

269 (Endorsed:) U. S. land office, Cœur d'Alene, Idaho. Adverse claim No. 52. Kirby Fraction Lode against The Shoshone and Summit Consolidated. Mineral application No. 192. Adverse filed October 22, 1895. James Graham, register.

U. S. LAND OFFICE,
CŒUR D'ALENE, IDAHO, *May* 14, 1897.

I hereby certify that the foregoing is a full, true, and correct copy of the adverse claim of R. J. Rutter and F. W. Bradley, owners of the Kirby Fraction mining claim, against the issuing of a patent to the Shoshone Mining Company for a portion of the Shoshone and Summit Consolidated Lode claims, as the same now appears on the file now in this office.

JAMES GRAHAM, *Register.*

DEFENDANT'S EXHIBIT "5."

This indenture, made on the 26th day of March, in the year o
our Lord, one thousand eight hundred and ninety-four, betwee
W. C. Miller of the town of Wallace, in the county of Shoshon
State of Idaho, the party of the first part, and the Shoshone Minin
Company, a corporation organized and existing under the laws
the State of Idaho, party of the second part

Witnesseth, that the said party of the first part, for and in co
sideration of four hundred and ninety-nine thousand and nine hu
dred (499,900) shares of the capital stock of the Shoshone Minin
Company this day delivered by the said party of the secon
270 part, the receipt whereof is hereby acknowledged, has granted
bargained, sold, remised, released, forever quitclaimed, an
by these presents does grant, bargain, sell, remise, release and fo
ever quitclaim unto the said party of the second part, and to it
successors and assigns, all that certain lode mining claim known
as and called the "Shoshone," situated in Yreka mining district
Shoshone county, Idaho, more particularly described as follows.

Beginning at the location notice which is posted at a point south
eighty (80) degrees west, one hundred and forty-seven (147) fee
from the southwest corner of survey No. 551 the "Last Chance"
mining claim, and being about twelve hundred feet directly ove
the point of discovery; thence running south sixty-two degrees
east, four hundred (400) feet, to the southeast center end stake
thence north forty-one (41) degrees east, three hundred (300) feet t
the northeast corner stake; thence north sixty two (62) degrees
west, ten hundred (1,000) feet to corner No. two (2) on the south-
east end line of survey No. 615, the "Skookum" Lode claim
thence south eighteen (18) degrees and thirteen (13) minutes west
along the southeast end line of the said "Skookum" Lode claim,
one hundred (100) feet, more or less, to corner No. three (3),
being the southeast corner No. four (4) of the said "Skookum"
Lode claim; thence along the southerly side line of said "Skoo-
kum" lode north sixty (60) degrees west, five hundred and
thirty (530) feet, more or less, to corner four (4); thence south
forty-one (41) degrees west, two hundred and ten (210)
271 feet, more or less, to the northwest center end post; thence
continuing in the same direction, three hundred (300)
feet to the southwest corner post; thence south sixty-two (62) de-
grees east, twelve hundred (1,200) feet, more or less, to a point on
the northerly side line of the "Sold Again" Lode claim, marked
by a post; thence northeasterly along the said north side line of
the "Sold Again" claim, four hundred (400) feet, more or less, to a
post; thence north forty-one degrees east, sixty (60) feet, more or
less to the southeast center end stake, the place of beginning, claim-
ing four hundred (400) feet running in a southeasterly direction,
and eleven hundred (1,100) feet running in a northwest direction,
along the course of the ledge.

Also, all that certain lode mining claim, known as and called the
"Summit," situated in the Yreka mining district, Shoshone county,
Idaho, more particularly described as follows:

Beginning at the location notice which is posted at a point one hundred and twenty feet west of the west end line of survey No. 551, the "Last Chance" mining claim, and ten (10) feet north of the northeast side line of the "Shoshone" lode, and being about twelve hundred feet (1,200) directly over the point of discovery; thence running south sixty-two (62) degrees east one hundred and twenty (120) feet to the southeast corner end stake; thence north forty-one (41) degrees east thirty (30) feet more or less, to a
272 stake No. 2, on the west end line of the "Last Chance" lode thence north along the west end line of the "Last Chance" lode, two hundred and ten (210) feet more or less, to the northwest corner of the "Last Chance" lode, a stake No. three (3); thence northwesterly along the west line of the "Republican Fraction" lode one hundred and fifty (150) feet, more or less, to the northeast corner hereof; thence north sixty-two (62) degrees west, three hundred (300) feet, more or less, to the northwest corner hereof; thence south forty-one (41) degrees west, three hundred (300) feet to the northwest center end stake hereof; thence continuing same line ten (10) feet to the southwest corner hereof; thence south sixty-two (62) degrees east, along the north side line of the "Shoshone" lode, five hundred and forty (540) feet, more or less to the southeast corner hereof; thence north forty-one (41) degrees east, ten (10) feet to the east center end stake. Claiming one hundred and twenty (120) feet running in a southeasterly direction and four hundred and twenty (420) feet running in a northwesterly direction, from this notice of location and the point of discovery thereunder, along the course of the ledge.

Being the same claim located on the twenty-first (21) day of March, A. D., 1894, by the party of the first part, and recorded in the office of the recorder of said county, in Book —, at pages — and —, respectively.

Together with all the dips, spurs, and angles, and also all the metals, ores, gold, and silver bearing quartz, rock and earth
373 therein; and all the rights, privileges, and franchises thereto, incident, appendant, and appurtenant, or therewith usually had and enjoyed; and also all and singular the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining, and the rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in, or to the said premises, and every part and parcel thereof with the appurtenances.

To have and to hold, all and singular, the said premises, to-ether with the appurtenances and privileges thereunto incident, unto the said party of the second part, its successors and assigns forever.

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

W. C. MILLER. [SEAL.]

Signed, sealed, and delivered in the presence of—

E. M. HEYBURN.
W. B. SAMS.

STATE OF IDAHO,
County of Shoshone, } ss:

On this 26th day of March, in the year one thousand and ninety-four, before me, E. M. Heyburn, a notary public in and for the said Shoshone county, personally appeared W. C. Miller, known to me to be the same person whose name is subscribed to the an-
274 nexed instrument, and the said W. C. Miller acknowledged to me that he executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

[SEAL.] E. M. HEYBURN,
Notary Public.

(Endorsed:) 798. Deed. W. C. Miller to the Shoshone Mining Company. Recorded at the request of W. B. Heyburn March 26, 1894, at 4 o'clock p. m., in Book 6 of Deeds, page 269, records of Shoshone county, State of Idaho. Barry N. Hillard, county recorder, by S. W. Sears, Jr., deputy recorder.

In the Circuit Court of the United States in and for the District of Idaho, Northern Division.

THE SHOSHONE MINING COMPANY (a Corporation), Complainant,
vs.
ROYAL J. RUTTER and F. W. BRADLEY, Defendants.

This cause coming on regularly for trial, it was stipulated
275 in open court between the parties plaintiff and defendant, and consented to by the court, that the testimony should be taken in open court, and such testimony should be filed in the case, together with any exceptions that might be saved to the rulings of the court and the taking of such testimony.

Whereupon plaintiff offers in evidence location notice of the Shoshone claim, which was admitted and marked Plaintiff's Exhibit "A" hereinbefore inserted.

Plaintiff offered in evidence the original location notice of the Ibex claim, which was admitted and marked Plaintiff's Exhibit "B," and is as follows:

PLAINTIFF'S EXHIBIT "B."

Notice of Location of Quartz Claim.

Notice is hereby given that the undersigned corporation, organized and existing under the laws of the State of Idaho, conforming to the mining laws thereof, and of the State of Idaho, and the local rules, regulations, and customs of miners, has this 14th day of August, A. D. 1896, located and does claim seven hundred and eleven (711) linear feet on this lode, lead, or vein of mineral-bearing rock in place, by four hundred and ten (410) feet in width, the same being 220 feet on each side of the center thereof, at the point of discovery, together with all dips, spurs and angles, and all other veins

lodes the top or apex of which lie within said boundaries. This location is named the "Ibex" mining claim, and is situated 6 in the Yreka mining district in Shoshone county, State of Idaho, and bounded and described as follows, to wit:

Commencing at a point immediately over the point of discovery the location notice which is posted at a point 30 feet east of the sterly center end stake, which said westerly center end stake is 0 feet from corner No. 1 of official survey No. 1126, said location tice being about 1,000 feet directly over the point of discovery; ence running 36 feet to the said westerly center end stake; thence rth 41 degrees east, 210 feet to the northwesterly corner stake; ence north 88 degrees 4 minutes east, 383 feet to the northeasterly rner stake; thence south 11 degrees 58 minutes east, 160 feet to easterly center end stake; thence continuing in the same course, 0 feet to the southeasterly corner stake; thence south 87 degrees minutes west, 711 feet to the southwesterly corner stake; thence rth 41 degrees east, 220 feet to the westerly center end stake and ce of beginning.

The discovery upon which this location is based is made in a id body of galena ore, uncovered and discovered at a point ectly under the point where the notice of location is posted, in a nel or drift now being worked and mined by the locator hereof. The adjoining claimants are the Last Chance lode on the north, Sold Again lode on the south, the Stemwinder on the east, and the Shoshone on the west, situated one-half mile southwest of Wardner on the west side of Milo creek, in Yreka mining district, Shoshone county, Idaho.

Discovered June 20th, 1896.

Located August 14th, 1896.

THE SHOSHONE MINING COMPANY,
Locator and Claimant.

TE OF IDAHO, }
County of Shoshone, } ss:

, W. B. Heyburn, do solemnly swear that I am the vice-president he Shoshone Mining Company, a corporation duly organized and sting under the laws of the State of Idaho; that I am acquainted h the mining ground described in this notice of location and ewith called the "Ibex" lode or claim; that the ground and m therein described, or any part thereof, has not, to the best of knowledge and belief, been located according to the laws of the ited States and of this State, or if so located that the same has n abandoned or forfeited by reason of the failure of such former tors to comply in respect thereto with the requirements of said s, and that I have opened new ground to the extent or depth of feet as required by the laws of Idaho.

W. B. HEYBURN.

Subscribed and sworn to before me this 14th day of August, A. D. 1896.

E. M. HEYBURN,
Notary Public.

ecorded August 21, 1896, at 1 o'clock p. m.

Whereupon W. CLAYTON MILLER was called on behalf of plaintiff and testified:

I am familiar with the discovery point of the Ibex mining claim. It is in a drift off from the end of the stope in ore. There are six or eight feet of concentrating ore. It is galena, carrying silver and lead. I located this claim by posting the notice vertically above this discovery point, attaching the notice to a post or tree, I have forgotten which, 25 feet west of the east end line of the claim.

Examining notice, witness says that it is a substantial copy of the one he posted.

I put up three stakes on the east end of the claim, on the west end first, the southwest corner, west center end stake, and northwest corner. The stakes were the regulation stake. They were marked and planted about 5 inches square and 5 feet high. The work was done in the middle of August, 1896.

Cross-examination:

To the question, Were you aware that the Kirby location covered that ground? objection was made as immaterial; overruled
279 and exception allowed. The witness answered: I was aware that they claimed the ground, and knew that they had some stakes in the ground. The point of discovery was between 800 and 1,000 feet vertically below the location notice. The vein upon which the location is made is a wide vein. It is fully 20 feet wide.

In answer to the question, Is it not fully a hundred feet wide? witness answered: Well, I expect it is; yes.

At this time it was stipulated that Mr. Miller, in discovering the Ibex, went in through the Sweeney tunnel, through the Last Chance claim.

At this time plaintiff offered in evidence certified copy of the adverse proceeding in the land office, which was admitted, marked Plaintiff's Exhibit "C."

Thereupon the following proceedings were had:

Mr. HEYBURN: In order to save controversy in this case I will say that the vein upon which we located is the vein that dips down through the Last Chance, has its apex in the Last Chance claim, and that it is the vein after it leaves the south side line of the Last Chance. I will meet that proposition fairly and squarely that it apexes in the Last Chance claim. Let the records show it.

Q. How did you find this ore?

A. Well, Judge, I did not find it—I did not——

Q. How did you make this discovery?

A. I did not make the discovery; I did not locate the claim. I located simply as an agent of the company.

Q. You are the man that did it?

A. Yes.

280 Q. If you are the man that did it, I want you to state where you found this ore?

A. In a drift off the end of the stope.

Q. From what works?

Mr. HEYBURN: I object to that as immaterial, what works it is from.

The COURT: He has admitted already that it is on the ledge which passes through the Last Chance.

Mr. HEYBURN: That apexes in the Last Chance.

Mr. MCBRIDE: I want to find out how he got there?

Mr. HEYBURN: I will stipulate that with you; he went in through the Sweeney tunnel, through the Last Chance claim.

Mr. MCBRIDE: To this point through works driven through there?

Mr. HEYBURN: Yes.

Witness excused.

Mr. HEYBURN: Now, I offer in evidence certified copy of the adverse proceeding in the land office.

Admitted, marked Plaintiff's Exhibit "C."

Mr. HEYBURN: This contains abstract of title and the adverse proceedings, copy of the articles of incorporation; and in this case I call counsel's attention to the fact that the deed from Miller to the Shoshone Mining Company is offered in evidence in the other case, but it is not denied in this case. In case there is any question about the sufficiency of the admission, we will offer the deed which is in evidence in the other case.

281 Mr. MCBRIDE: It will be understood that the deed is in evidence from Miller to the Shoshone Mining Company.

Mr. HEYBURN: Now, we will stipulate that the testimony for both sides as to the Kirby location in the other case shall be the testimony in this.

Mr. MCBRIDE: I am perfectly willing that the testimony on both sides, so far as the Kirby location and the conflict between the Kirby and Shoshone, may be considered as evidence in this case to the extent that it may be applicable. Of course it is different ground.

Mr. HEYBURN: Well, let that stipulation appear in the record.

Mr. MCBRIDE: On both sides?

Mr. HEYBURN: Yes, and the exhibits and everything.

Mr. MCBRIDE: Exhibits and everything.

Plaintiff rests.

Mr. McBride, counsel for the defendants, moves to dismiss plaintiff's bill, on the ground that it appears from all the testimony in the case that the defendants, The Kirby Mining Company, have been in possession of this ground for more than the time of the statute of limitations; that the work has been done by them before there was any attempt on their part to locate the ground; and it is attempted to be located on the ground that was known by the locator at that time to be covered by their location on the stand, and that defendants have had actual, continued adverse possession.

282 The motion to dismiss plaintiff's bill was denied, and an exception allowed.

Whereupon F. W. BRADLEY was called upon behalf of defendants and testified:

I am a mining man. Have been in Wardner district six years and a half. Am thoroughly familiar with the locations of that country; have been over the ground a great many times. I have been all over the ground.

The following proceedings were then had:

Q. I will ask you to state whether those claims have a vein penetrating them, passing through them.

Mr. HEYBURN: Object to that as immaterial.

A. Yes.

Mr. HEYBURN: There is a stipulation in the record here, which was accepted by both sides, that this discovery was made upon a continuation of that vein after it passed the south side line of the Last Chance claim. It is not necessary or material after that to go into a long investigation of that question to determine whether that stipulation is true or not.

The COURT: I do not know as I recall the stipulation. I understand it was made on the ledge which apexed in the Last Chance, and also there was something added upon the ledge after it left the side lines.

Mr. HEYBURN: That it dips out of the side line.

283 The COURT: How far you would allow it to extend in a southeasterly direction from the Last Chance I do not think the stipulation covers. If there was a stipulation here that the ledge which runs across the country there easterly from this Ibex, is it location?

Mr. HEYBURN: Yes.

The COURT: If there were a stipulation of that kind I would exclude all this other testimony. I do not know whether your stipulation goes that far.

Mr. HEYBURN: I do not catch the exact point.

The COURT: I meant far enough in a southeasterly direction from the Last Chance mine to clearly cover the ground within the two side lines of the Ibex.

Mr. HEYBURN: Yes, it is the same ledge; that is the stipulation; it is the same ledge.

The COURT: It crosses through from the Last Chance into the Stemwinder, across the Emma there?

Mr. HEYBURN: It trends through there.

Mr. MCBRIDE: Unless the counsel admits the same ledge passes through the same vein——

Mr. HEYBURN: I admit it passes through there on its strike.

Q. What is its dip that is admitted; what is the dip of that ledge as it passes through the Last Chance and Stemwinder?

A. The average dip from the Stemwinder——

Mr. HEYBURN: Object to that. The question is as to the dip of that ledge as a ledge.

A. Well, in that country——

284 Mr. HEYBURN: Hold on. I object to the testimony as to any particular dip from the Stemwinder. It is an immaterial issue interjected into this case, and cannot affect the rights of this party to recover. We stipulated that this is the same ledge that passes on its strike or trend through these various claims.

The COURT: Which claims?

Mr. HEYBURN: All of them.

The COURT: Last Chance?

Mr. HEYBURN: Yes, Last Chance, Bunker Hill, Stemwinder, Tyler, and Emma.

The COURT: That is location upon the same ledge?

Mr. HEYBURN: On the same ledge.

Mr. McBRIDE: Do you admit——

The COURT: It strikes me that covers the whole question.

Mr. HEYBURN: Now, the rest of that is a legal proposition; that is my intention, sift it right down. The rest of it is a question of lines.

The COURT: Questions of lines as to the rights of those claims.

Mr. HEYBURN: We don't need to ask the opinion of any witness on that.

The COURT: I do not see why it does not cover it, Judge McBride.

Mr. McBRIDE: If he concedes that the apex was there in the direction we claim it is. He won't admit what the dip is.

285 The COURT: It is immaterial if it is upon the same ledge; the apex is in these claims.

Mr. McBRIDE: It might dip away from them.

The COURT: It could not be located upon that ledge if it dips the other way. He admits their claim is located upon that ledge.

Q. Where is the apex of that ledge that passed through those claims?

Mr. HEYBURN: Object to that as immaterial; that is, I take it is directed to this Stemwinder, the allegations in reference to the Stemwinder in the answer, and upon that supposition, and I presume I am right. I desire to interpose the objection that the Stemwinder, as they themselves bring it into court, is not interested there. I object to the testimony as immaterial, so far as the Stemwinder is concerned, because it ain't interested in it any more than it is interested in a body of ore lying over here on the other side. It can have no title to it; don't make any difference.

Mr. McBRIDE: What I want to do by these questions is to get at the facts; I do not know what opinion the court may hold as to the law; that is something we do not know; I am trying to get at the facts.

The COURT: I have made up my mind to let you ask that question as to where the apex is. Overrule the objection.

Exception.

Mr. HEYBURN: Your honor does that upon the theory
286 suggested by your honor? (Referring to suggestion made by the court to Mr. Heyburn during Mr. Heyburn's argument, which argument the reporter was not requested to take.)

The COURT: I have my own ideas. I do not know what use you can make of it afterwards. I am doing it upon the theory that I have already suggested.

Mr. HEYBURN: That is what I supposed. I will save my exception.

The COURT: I have not made up my mind. I simply suggested to you what my idea is. I may be wrong. Exception is saved.

A. May I point it out on the map?

Q. You may point it out if there is any mark there by which you may indicate it.

A. Why, the foot wall of the vein is indicated by these flags. (Referring to map.)

The COURT: The foot wall?

A. The foot wall of the vein where it reaches the surface, at each one of these places where flags were standing the foot wall of the vein, can be distinctly seen.

Q. Well, go right on up with it.

A. And the apex can be followed from flag to flag, across the Bunker Hill, across the Stemwinder, across the Emma, across the Last Chance into the Tyler.

Q. Now, what is the dip of that vein; have you been through these works to see what the general dip of it is, the direction of the dip?

Mr. HEYBURN: Object to that as immaterial.

(Overruled.)

287 Q. The direction of the dip?

A. The general direction of the dip is to the southwest.

Q. Have you been through those works yourself, personally, underground there to know where that vein is?

A. I have been a great many times through the Bunker Hill and Stemwinder, and a number of times through the Last Chance works.

Q. Are there any works in this ground underneath, represented by the Helen Marr location, underneath the surface?

Mr. HEYBURN: Object to that as immaterial; Helen Marr has no place in this case. I would like to submit a proposition to the court whether or not it is proper or allowable under the circumstances, two people here adversing each other; that is, one applying for a patent and the other is adverse, it is not competent to litigate a claim that does not touch the ground in controversy in this suit.

The COURT: Not to controvert the title of any other claim, and I don't consider we are controverting the title of these claims you have referred to, the Bunker Hill, the Stemwinder, and the Last Chance. The only object, the only idea, I had in view in permit-

ting that testimony, is to discover whether or not your location is based upon a previously discovered ledge.

Mr. McBRIDE: The object of this is to show that we own this ground and they do not.

288 The COURT: I will sustain the objection to that if that is the object,

(Defendants except.)

Q. Mr. Bradley, I will ask you to state whether the apex of that vein is in the Stemwinder; I mean of that big vein that you refer to?

The COURT: Hasn't he said the apex is right along that line?

Mr. HEYBURN: Yes, he did.

A. I said it passed through the Stemwinder from the Bunker Hill into the Emma.

The COURT: Yes, that is what he said.

Mr. HEYBURN: Are those flags numbered, Mr. Bradley? It would be well in the record to give the number of the flags.

The COURT: Just number those flags that you say are on the apex of the ledge.

A. No. 2, No. 3, No. 4, No. 5, No. 6——

The COURT: There are two there in the Emma?

A. Different portions of the vein. No. 6 is on the foot wall, No. 8, No. 9.

Q. Are they numbered on there?

A. Yes, sir; they are numbered on the map.

The COURT: No. 6 is on the Emma ground. Now, then, what is the next one above there on the Tyler ground?

A. No. 8, No. 9.

The COURT: What is the one beyond there?

A. I have not been to that one; I do not know.

289 The COURT: I thought you left out No. 7.

Mr. HEYBURN: He has no flags on the Last Chance, he jumps that.

Q. Does that map show any scale?

A. No, it does not.

Q. Do you know the scale that it is made on?

A. 50 feet to the inch.

Witness excused.

Mr. McBRIDE: That map we desire to put in evidence also, as in this case, as our Exhibit "1" it will be.

Now, at this time the map just referred to was admitted in evidence and marked Defendants' Exhibit 1.

Mr. HEYBURN: There is a lode line that I want on that map.

Mr. McBRIDE: Miller and Porter can do that.

Mr. HEYBURN: We can do that out of court?

Mr. McBRIDE: Yes.

Mr. HEYBURN: I want the course of the lode on a horizontal

plane such as was given in that trial, and then that map will be all right for an exhibit.

I have here now a transcript containing the judgment in the Stemwinder case, showing the date of the location and all the facts about it, and the fact that ground is given to the Emma, I will then introduce—you admit that?

Mr. McBRIDE: No, sir.

The COURT: Well, he can introduce it. What about the ownership of the Stemwinder?

290 Mr. McBRIDE: Here is the notice of location. The muniments of title I understand are all here. We want to begin at the beginning. We don't want to introduce part of these until we get more definite.

Mr. HEYBURN: Judge, let's just look at this judgment and see whether or not it don't settle some of those questions fully.

The COURT: I do not know as I am going to try the title to the Stemwinder in this.

Mr. McBRIDE: It is simply to show that we are the owners of the Stemwinder; if my friend will admit that, we are all right.

Mr. HEYBURN: It will depend something on the date that you claim.

Mr. McBRIDE: Well, we claim by the original location.

Mr. HEYBURN: That has been adjudicated in a two handed fight.

The COURT: That has been adjudicated and a different date settled.

Mr. McBRIDE: Not between these parties.

The COURT: It strikes me the only question is whether the Stemwinder was located before this Ibex.

Mr. HEYBURN: There is no question about the Stemwinder being older than the Ibex.

The COURT: About settling the Stemwinder here, I do not see how about that?

Mr. HEYBURN: They allege a fictitious date of the Stem-
291 winder; I do not want any judgment of this court upon that, on the ground there is no testimony on that.

The COURT: Introduce their notice, and then you can introduce the record there to show that a different date has been adjudicated, and the proof can be considered if that becomes important.

Mr. McBRIDE: We insist the Stemwinder is the oldest location among these locations lying west there. Do you mean that adjudicates that the Stemwinder cannot be shown to be prior to some location there?

Mr. HEYBURN: I mean that the Stemwinder cannot be shown to be prior to the record.

The COURT: You can introduce your record and we will determine that record afterwards.

Mr. HEYBURN: If you will introduce your notice of location I will introduce this record, and we will waive the question of proving your location of the Stemwinder further than that.

Mr. McBRIDE: About the amended location. I propose to prove

that the Stemwinder is the oldest of all the locations; so alleged in the answer, and I desire to prove it.

Mr. HEYBURN: I refuse to further plead.

Mr. McBRIDE: In order to show it was located, we will have to show the date.

Mr. HEYBURN: If the court pleases, how is it material about the date?

Mr. McBRIDE: It turned out to be very material in the Tyler case. I want to have it correct in this one.

292 The COURT: The materiality of it is, in my view of the law, to show that there was a ledge located there; that this ledge upon which the Ibex was located was previously located.

Mr. HEYBURN: That the apex of that ledge was previously located.

The COURT: Yes.

Mr. HEYBURN: That is admitted.

The COURT: I know it is admitted; so far as my view of the law, hat is all that is necessary. There may be some question raised of which I do not see the pertinency now.

Mr. HEYBURN: He wants to get the date of the location of the Stemwinder.

The COURT: I do not think that is an important question.

Mr. McBRIDE: You regard that as only material to determine it was prior?

The COURT: Yes, seems to me so.

Mr. McBRIDE: Then I will offer in evidence simply the location notice and the amended location notice of the Stemwinder.

Mr. HEYBURN: I object to them as immaterial; no issue in this case on which that testimony can be material.

The COURT: Well, I will overrule the objection and consider them. (Exception.)

293 Thereupon the two documents just offered were admitted in evidence and marked respectively Defendants' Exhibits 2 and 3. Copies of said exhibits are to be found beginning on pages 82 and 85 of this record, and are made a part hereof.

Mr. McBRIDE: I think we are through.

Mr. HEYBURN: It is stipulated that the lines showing the true course of the ledge on map Exhibit "A," used in the case of Tyler Mining Company against Sweeney *et al.*, shall be placed upon the map, Defendants' Exhibit 1, as indicating the line that would be fixed by the respective engineers should they testify in this case, as to the true course of the ledge passing through the grounds in controversy.

Mr. HEYBURN: Now, the court admitted in evidence —. Are you through with your side?

Mr. McBRIDE: No, sir.

Mr. HEYBURN: When you are I want to introduce some papers.

Mr. McBRIDE: Can't we enter a stipulation for the purpose of this case, the allegation in the answer that Mr. Bradley is the owner of the Stemwinder, and for no other purpose, is admitted to be true?

Mr. HEYBURN: Yes, the stipulation is for the purpose of this case,

and for no other purpose, and to be used in no other case. It is admitted that Mr. Bradley is the owner of the Stemwinder mining claim. This admission is not to bind any party to this action in any other case.

The COURT: Have you anything further to offer?

294 Mr. McBRIDE: I think not; I will see. My client is objecting to the stipulation I made. If he objects to it I will have to withdraw it. Will have to introduce proof on that subject.

The COURT: I doubt if you can change the result if you introduce proof.

Mr. McBRIDE: My client says he cannot agree to stipulate as to the general course of the vein, so I withdraw my stipulation.

Mr. HEYBURN: Readjust those lines and have them put on that map, and we will argue the effect of it to the court, as the testimony of Mr. Loring, Mr. Porter and Mr. Miller, as to the course of that ledge; the court can make an order to do it.

Mr. McBRIDE: That is not testimony in this case unless we consent to it.

The COURT: He can offer that as testimony, and you can object to it.

Mr. McBRIDE: No, sir; the witnesses are here and they can be produced, and produce the testimony. I think from what I have learned some of them have a different opinion than that.

The COURT: You offer those lines, do you, as testimony? Counsel objects to the offer. I will overrule the objection and allow you to introduce them.

Mr. McBRIDE: I take an exception.

Mr. HEYBURN: I will have Mr. Miller put a line on that map.

295 Mr. McBRIDE: The stipulation we entered into of course is vacated.

The COURT: It is understood the court will allow Mr. Miller to put it on the map according to those lines?

The COURT: He had better do it in the presence of one of the others.

Mr. McBRIDE: In that view of the case I will call Mr. Bradley to testify on that subject.

The COURT: Very well.

Mr. McBRIDE: The general course of that lode.

F. W. BRADLEY, recalled on behalf of the defendants, testified as follows:

Direct examination.

By Mr. McBRIDE:

Q. Mr. Bradley, you have testified that you were acquainted with the strike of that lode, with its location through those different claims. Will you testify in regard to the general course and strike of that lode through the country there, through those different claims on which the flags are established?

A. I can, yes, sir, by reference to objects on the map; not by course.

Q. Very well, if you can refer to any objects on the map you may do it for the purpose of indicating what the course is.

296 A. (Witness referring to Exhibit 1.) In the Last Chance workings on the — at the level of the Sweeney tunnel, the foot wall of the vein is at a point slightly ahead of the main Sweeney tunnel. The point is indicated——

The COURT: One moment. Can't you figure out the general course of that ledge through the country, without going through all this detail? In the first place, I do not regard it as a very important matter; at any rate, going into all this detail, examining every point, will consume an immense amount of time. Can't you figure it out? Can't you give the course by objects on the map?

A. I could with tools. I was just going to mention two points.

The COURT: Don't mention more than two; don't go into details. I thought you were undertaking to select all along their different points.

A. This point, that is immediately west of the main Sweeney tunnel is here on the—rather is indicated on the other map introduced previously. Another point on the foot wall of the vein at a corresponding level is immediately under this discovery; the discovery of the Sold Again.

Q. Yes, drawing a line between those points, would drawing a line between those points indicate what you would regard as the general course of that lode?

A. It would be the general course of the lode through this particular country, right in this portion of the vein.

297 Q. Now, put those two points on the map so they can be marked.

Mr. HEYBURN: Make them with a ruler.

A. Yes, got a ruler here somewhere, scale? (Witness gets a long stick and makes a mark on the map referred to.)

Q. Now, just mark that course of lode, with your own name.

Mr. MCBRIDE: Take the witness.

Mr. HEYBURN: I have no questions to ask Mr. Bradley.

Witness excused.

Mr. HEYBURN: Now, I ask the court to rule out everything about the date of the Stemwinder; that is to say, no judgment in this case will undertake to fix the date of the Stemwinder.

The COURT: No, but I have allowed them to introduce their notice, and now allow you to introduce your record; but I make no ruling as to what the effect of it will be. I make no ruling as to the effect of it.

Mr. MCBRIDE: Object to that record as incompetent, irrelevant, and immaterial; a record made between different parties, and not binding the Stemwinder mine or the present Stemwinder owners.

The COURT: I will overrule the objection and let it be admitted.

Mr. HEYBURN: I offer in evidence from the record in the Supreme Court of the United States, case No. 62, October term, 1890,
298 Stemwinder Mining Company, plaintiff in error, *v.* The Emma & Last Chance Consolidated Mining Company, *et al.*, filed August 8th, 1889.

First. The instruction given by the court to the jury, found at folio 64. Then I offer in evidence the judgment, commencing at folio 43, page 28, and extending down to folio 48, in which is the verdict of the jury in favor of the defendants. Then I offer in evidence the decision of the supreme court of Idaho confirming that judgment; and I offer in evidence the decision of the Supreme Court of the United States, which I will bring into court, confirming the judgment of the supreme court of Idaho. That makes a complete record in the case. Let the record show that the Stemwinder Mining Company there is the grantor, predecessor in interest of the plaintiff in this action, so far as its claim to the Stemwinder is concerned. That the Emma and Last Chance Consolidated Mining Company is the grantor, predecessor in interest of the Last Chance Mining Company, the present owner of the Emma mining claim.

The COURT: These are admitted.

Mr. MCBRIDE: We insist they are entirely inadmissible on the ground that they are not the same parties.

The COURT: Overrule it. I have introduced it.

Thereupon the writings last offered were admitted in evidence and designated as Plaintiff's Exhibit "D." A copy of said exhibit is to be found beginning on page 68 of this record, and is made a part hereof.

Mr. HEYBURN: That is all of the rebuttal.

The COURT: I suppose you rest now, on both sides?

(None of the counsel answer in the negative.)

(Here follow diagrams marked pp. 298*a* & 298*b*.)

299 PLAINTIFF'S EXHIBIT "C."

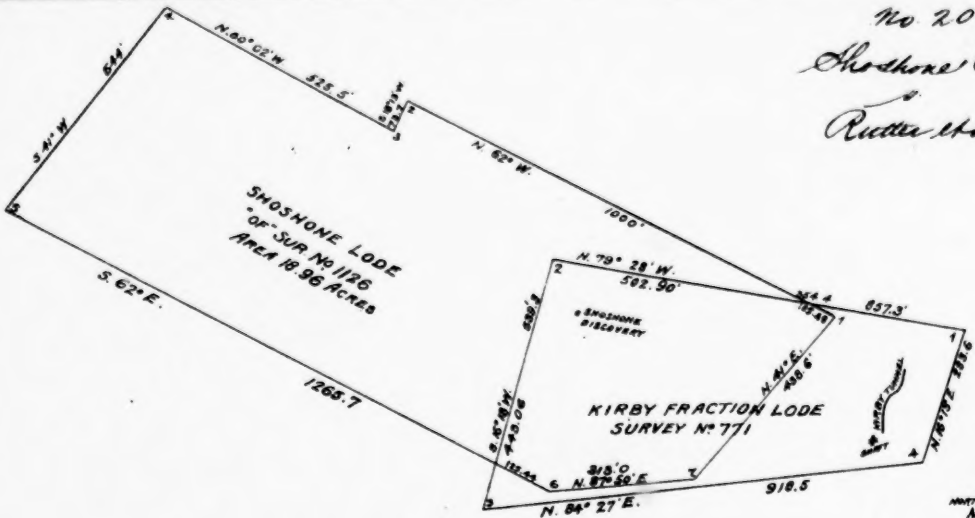
UNITED STATES LAND OFFICE, CŒUR D'ALENE, IDAHO.

In the Matter of the Application of ROYAL J. RUTTER and F. W. BRADLEY for a Patent for the "Kirby Fraction" Lode Mining Claim, in the S. W. Half of Section 12, Township 48 N., Range 2 E., Boise Meridian, in the Yreka Mining District, in Shoshone County, State of Idaho.

To the register and receiver of the United States land office of Cœur d'Alene, Idaho, and to the said Royal J. Rutter and Frederick W. Bradley, applicants aforesaid:

Whereas, the said Royal J. Rutter, on behalf of himself and his co-owner, Frederick W. Bradley, did on the 23d day of July, 1896, as appears from the published notice thereof, hereinafter appended, file in the said land office of the United States at Cœur d'Alene, in said land district, a certain plat of a survey of a certain lode mining

No 208
Shoshone Co } p. 298a
"
Rutter et al



I hereby certify that the above diagram correctly represents the conflict claimed to exist between the Kirby Fraction Lode Survey No. 771 Royal J. Rutter et al claimants and the Shoshone Lode of Consolidated Survey No. 1126 Shoshone Mining Company claimants as actually Surveyed by me Situated in Freka Mining District Shoshone Co Idaho

W. Clayton Miller
U. S. Deputy Mineral Surveyor Aug. 20. 1896.

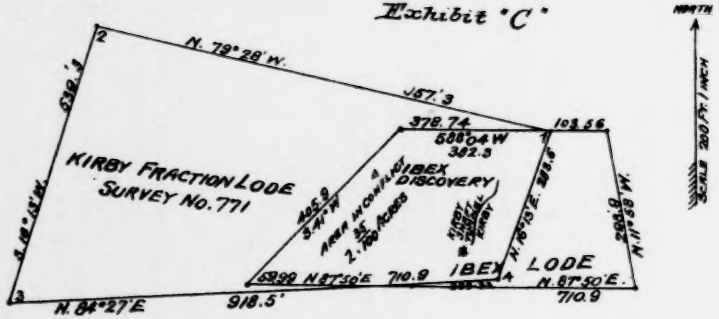
DESCRIPTION OF CONFLICT

BEG. AT N.W. COR. OF KIRBY FRACTION

TH	S. 16°13' W	443'.06 FT.
"	S. 62° - E.	126'. 44 "
"	N. 87° 50' E.	313'. "
"	N. 41° E.	438'. 6 "
"	N. 62° W.	105'. 48 "
"	N. 79°28' W.	502.90 "

TOTAL AREA SHOSHONE. 18.96 ACRES
AREA IN CONFLICT WITH THE KIRBY FRACTION LODE 5.24 ACRES

Exhibit "C"



No. 208
Shoshone Co } p. 298 b
Ritter et al

DESCRIPTION OF CONFLICT

BEG. AT N.E. COR. OF KIRBY FRACTION

TH	S. 88° 04' W.	287.74 FT.	3
.	S. 41° W.	405.9 .	
.	N. 87° 50' E.	59.99 .	
.	N. 84° 27' E.	399.32 .	
.	N. 16° 18' E.	283.6 .	

TOTAL AREA IBEX LODE = 3.77 ACRES
AREA IN CONFLICT WITH THE
KIRBY FRACTION LODE 2.35 ACRES

I hereby certify that the above diagram correctly represents the conflict claimed to exist between the Kirby Fraction lode Survey No. 771 Royal J. Ritter et al claimants and the Ibex lode Shoshone Mining Company claimants, as actually surveyed by me, situated in Yreka Mining District Shoshone Co. Idaho

W. Clayton Miller
U. S. Deputy Min.
Surveyor Aug. 20, 1896

claim, together with an application for a United States patent for the same, calling the said lode claim the "Kirby Fraction," and alleging that said lode claim was situated in the Yreka mining district in Shoshone county, Idaho, describing the same in the plat and field-notes filed therewith, and the said applicants did on the 1st day of August, 1896, by the publication of a notice in the "Wardner News," a newspaper published in the town of Wardner in said Shoshone county, Idaho, give notice that they would apply for a United States patent for the premises as aforesaid, which notice was as follows:

Application for a Patent.

No. 205.

UNITED STATES LAND OFFICE,
COEUR D'ALENE, IDAHO, *July* 23, 1896.

Notice is hereby given that in pursuance of chapter six of title thirty-two of the Revised Statutes of the United States, Royal J. Rutter (on behalf of himself and his co-owner, Frederick W. Bradley), whose post-office is Wardner, Shoshone county, Idaho, has made application to the United States for a patent for the Kirby Fraction Lode mining claim, designated as mineral survey No. 771, situate in Yreka mining district, county of Shoshone, and State of Idaho, and which is more fully described as to metes and bounds by the official plat, and by the field-notes of survey thereof now filed in the office of the register of the district of lands subject to sale at Coeur d'Alene city, State of Idaho, which field notes of survey describe the boundaries and extent of said claim on the surface with magnetic variations at 21 degrees 50 minutes east, as follows, to wit: Beginning at point of discovery, where notice of location was originally posted, whence mouth of tunnel bears N. 88 degrees 1 minutes E., 10 feet; thence runs in a southerly direction 192 feet; thence N. 88 degrees 21 minutes E., along the course of the vein as near as practicable 90 feet to center of easterly end line to a post four inches square, 5½ feet long, 2 feet in the ground, with mound of earth, marked E. E. C., 771; thence N. 16 degrees 30 minutes E., 82 feet to corner No. 1 of claim, a pine post 4 inches square, 4½ — long, 2 feet in the ground, with mound of earth marked 1–771, whence corner No. 1 survey No. 603, Stemwinder lode, bears N. 42 degrees 20 minutes E., 134 feet distant; and corner No. 2, survey No. 550, Emma lode, bears S. 64 degrees 41 minutes E., 180.7 feet; location corner bears N. 42 degrees 50 minutes W., 116 feet distant; corner No. 4, survey No. 551, Last Chance lode, bears S. 88 degrees minutes W., 657.1 feet distant; Haystack Mt. bears N. 43 degrees ; a prominent peak, bears N. 70 degrees 15 minutes E.; corner o. 1, Shoshone lode, bears N. 86 degrees 36 minutes W., 256 feet stant; thence N. 79 degrees 28 minutes W., 354.4 feet, to intersect ne 1–2, survey 1126, Shoshone lode, at N. 62 degrees W., 105.48 et, from corner No. 1, 658.94 feet, intersect line 4–1, survey No.

551, at N. 3 degrees 33 minutes E., 142.9 feet from corner No.
302 4, 857.3 feet, to corner No. 2, identical with location corner, a post 4 inches square 5½ feet long, 2 feet in ground, with mound of earth, and stone marked 2–771; whence a pine stump 5½ feet high, 5 inches in diameter, blazed and marked 2.771 B. O., bears N. 52 degrees, 45 minutes W., 86 feet distant; a tamarack tree 11 inches in diameter, blazed and marked 2.771 B. T. bears S. 57 degrees, 45 minutes E., 13.7 feet distant; Haystack Mt. bears N. 50 degrees E.; Sacred Mt. bears S. 15 degrees, 55 minutes E.; thence S. 16 degrees, 30 minutes W., 272 feet to west end center post, 4 inches square, 5½ feet long, set 2 feet in the ground, with mound of earth and stone, marked W. E. C. 771; whence discovery point bears N. 88 degrees, 21 minutes E., 803.5 feet distant, 443.06 feet intersect line 5–6, survey No. 1126, at N. 62 degrees W., 125.44 feet, from corner No. 6, 539.3 feet to corner No. 3, identical with location corner, a post 4 inches square, 5½ feet long, 2 feet in the ground, with mound of earth and stone, marked 3–771, whence corner No. 2, survey No. 933, Sold Again Fraction lode, bears N. 45 degrees 10 minutes E., 45.2 feet distant, a pine tree 12 inches in diameter, blazed and marked 3–771 B. T., bears S. 26 degrees W. 66 feet distant, a pine tree 9 inches in diameter, blazed and marked 3–771, bears N. 22 degrees 50 minutes E., 8 feet distant; Haystack Mt. bears N. 47 degrees 20 minutes E.; a prominent peak bears N. 13 degrees 15 — W.; thence N. 84 degrees 27 minutes E., 20.85 ft. intersect line 2–3, survey No. 933, at S. 19 degrees 6 minutes W., 31.49 feet from corner No. 2, 519.18 ft.; intersect
303 line 1–2 survey, No. 933, at N. 87 degrees 50 minutes E., 485.09 feet from corner No. 2, 918.5, to corner No. 4, a post 4 inches square, 5½ ft. long, 2 feet in the ground, with mound of earth, marked 4–771, whence location corner bears N. 84 degrees 27 minutes E., 317 feet distant; corner No. 1, survey No. 579, Bunker Hill lode, bears S. 47 degrees 01 minute E., 263.9 feet distant, ¼ section corner between sections 12 and 13, T. 48 N., R. 2 E., Boise meridian, bears S. 51 degrees 58 minutes E., 606.8 feet distant; shaft 4 by 6 feet, 15 feet deep bears N. 53 degrees 45 minutes W., 120 feet distant; a fir stump 15 inches in diameter, 4½ feet high, blazed and marked 4–771 B. O., bears N. 49 degrees 40 minutes W., 20 feet distant; a fir stump 18 feet high, 2 feet in diameter, blazed and marked 4–771 B. O., bears S. 80 degrees 20 minutes E., 38.2 feet distant; Haystack Mt. bears N. 41 degrees 30 minutes E.; a prominent peak bears N. 1 degree 10 minutes W.; thence N. 16 degrees 13 minutes E., 283.6 feet, to corner No. 1, the place of beginning. The survey of exterior boundaries.

Total area of survey of Kirby Fraction claim, 8.057 A. Conflict with survey No. 1126 (claimed), 5.243 acr. Conflict with survey No. 551 (not claimed), 1.072 acr. Conflict with survey No. 933 (not claim-), 0.163 acr. Net area claimed by survey No. 771 6.822 acr. Forming a portion of S. W. ¼ section 12, T. 48 N., R. 2 E., Boise meridian, U. S. surveys. The said mining claim being of record in the office of the county recorder at Murray, in the county and
304 State aforesaid, the said mining claim being designated on the official plat and field-notes of survey as survey No. 771.

The adjoining claims are as follows: Last Chance, Sold Again Fraction, Shoshone mining claims.

Any and all persons claiming adversely the mining ground, vein, lode, premises, or any portion thereof so described, surveyed, platted, and applied for, are hereby notified that unless their adverse claims are duly filed as according to law, and the regulations thereunder, within the time prescribed by law, with the register of the U. S. land office at Cœur d'Alene, in the State of Idaho, they will be barred, in virtue of the provisions of said statute.

JAMES GRAHAM, *Register.*

First publication August 1, 1896.

Whereas, the first publication of the said notice in said newspaper was on the first day of August, 1896, in said "Wardner News," a weekly newspaper published at Wardner, as aforesaid, in the State of Idaho.

Now, therefore, the Shoshone Mining Company, a corporation, organized and existing under the laws of the State of Idaho, having its principal place of business at Osburn in said Shoshone county, and whose post-office address is Osburn, Shoshone county, Idaho, does now, on this 9th day of September, 1896, enter this its protest and adverse claim against the issuance of a patent to the said Royal J. Rutter and F. W. Bradley upon their pretended
305 claim upon the said Kirby Fraction Lode claim, as set forth in said plat and field-notes as aforesaid, for the following reasons, to wit:

I.

Because the surface ground and veins or lodes contained therein, as set forth and described in the plat and field-notes of the said Kirby Fraction Lode claim, or the greater portion thereof, are not the property of the said applicants, or either of them, neither are they entitled to hold the same under or by virtue of the local laws, rules, and customs of the miners in said district, or the laws of the State of Idaho, or the statutes of the United States relating to mining claims.

II.

Because a great portion of the premises described in the said plat and notice of said applicants, and claimed by them, as the so-called Kirby Fraction Lode mining claim, is owned and claimed adversely by this protestant as the "Shoshone" Lode mining claim, as will appear by a reference to the abstract or title herewith filed and made a part of this protest, and marked Exhibit "A," and by the plat showing the boundaries of the said "Shoshone" mining claim and its conflict with the alleged "Kirby Fraction" Lode mining claim. And this protestant did on the 21st day of August, 1895, make an application for a United States patent in the said
306 land office for the said "Shoshone" Lode mining claim, which said application was made and filed in due form, and an order for a publication of the notice of the same was duly made and published in the newspaper aforesaid, beginning on August

24th, 1895. And on the 22d day of October, 1895, the said Royal J. Rutter and Frederick W. Bradley did file an adverse claim and protest against the issuance of a patent for the said "Shoshone" Lode mining claim, including all of the ground in controversy between the said "Shoshone" claim and the said alleged "Kirby Fraction" claim, and a suit is now pending in the United States circuit court for the district of Idaho, northern division, for the purpose of determining the title and the right of possession of the ground in conflict between the said "Kirby Fraction" and the said "Shoshone" Lode mining claim, for which the said Royal J. Rutter and Frederick W. Bradley are assuming to apply for a patent in this proceeding, disregarding the fact that the title to the right of possession of the ground so in controversy as aforesaid, is now involved in an action pending in the said United States circuit court and undetermined therein, wherein each and every question of title that can or may be raised by either party to the said ground is at issue to be determined by that court.

III.

307 Because this protestant has held, occupied, and possessed that portion of the said premises applied for as the "Kirby Fraction" Lode mining claim, which belongs to the said Shoshone mining claim, as a part thereof, since the 21st day of March, 1894, and has mined upon and occupied said ground continuously since said time. Such occupation and possession of this protestant of the ground in controversy has been, under and by virtue of a full compliance with the local laws, rules, and customs of the said mining district, the laws of the State of Idaho and of the United States pertaining to mineral lands.

IV.

Because this protestant has held, occupied, and possessed all of that portion of the so-called "Kirby Fraction" Lode mining claim, as represented on the plat of survey made by W. C. Miller, deputy U. S. mineral surveyor, showing the conflict between the "Shoshone" claim and the said "Kirby Fraction" claim filed herewith, marked Exhibit "B," and made a part of this protest, and has held, occupied, and possessed the same as a *bone fide* owner by purchase for a valuable consideration from the original discoverer and locator of the said "Shoshone" mining claim, as shown by said abstract of title.

V.

Because on the 21st day of March, 1894, the ground and premises in controversy were unoccupied, unappropriated, vacant
308 mineral lands belonging to the United States, subject to location and purchase under the provisions of law regulating the purchase of mining claims, and on said 21st day of March, 1894, W. C. Miller, who was then and there a citizen of the United States, over the age of twenty-one years, made a valid discovery of a lode or ledge of mineral-bearing rock in place, containing silver and

lead, within the boundaries of the said "Shoshone" mining claim, and then and there located said "Shoshone" mining claim upon said discovery, by posting a notice of such discovery and location at the point on the surface immediately above the said discovery of mineral, and by so distinctly marking the location upon the ground that its boundaries can be readily traced, and thereafter, on the 26th day of March, 1894, the said locator caused to be recorded in the proper office a copy of location notice so posted as aforesaid, which said notice so recorded contained the name of the claim, the date of location, the number of feet claimed in each direction from the point of discovery, the name of the locator and such a description of the claim, with reference to natural objects and permanent monuments, as would fix the location thereof. And on the 26th day of March the said locator, by good and sufficient deed of conveyance made, executed, and delivered by him to this protestant, The Shoshone Mining Company, conveyed the said Shoshone mining claim to the protestant herein, who has since said 26th day of
309 March, 1894, occupied, mined upon, and possessed the said "Shoshone" mining claim, and is now in the possession thereof working and mining thereon. And this protestant has during each and every year since the said 26th day of March, 1894, expended in labor and improvements upon the said Shoshone mining claim more than one hundred dollars.

VI.

Because on the 20th day of June, 1896, the ground and premises shown by the plat hereto annexed to be in conflict with the "Ibex" Lode mining claim, which plat is marked Exhibit "C" and made a part of this protest, was unappropriated public mineral lands of the United States, and subject to location as such, and on said 20th day of June, 1896, the plaintiff made a discovery of a lode of mineral-bearing rock in place, within the boundaries of the said "Ibex" Lode claim, which said rock contained silver and lead in paying quantities, and thereafter, on the 14th day of August, 1896, this protestant, The Shoshone Mining Company, did locate the said "Ibex" Lode mining claim upon said discovery, by posting a notice of said location immediately over the point of discovery, and by so distinctly marking the boundaries of said "Ibex" claim upon the ground that its boundaries could and can be readily traced.

And thereafter, on the 21st day of August, 1896, this protestant did cause to be filed in the office of the recorder of Shoshone
310 county, Idaho, what was substantially a copy of the notice of location so posted as aforesaid, a certified copy of which said notice so recorded as aforesaid is hereto annexed, marked Exhibit "D" and made a part of this protest.

That by reason of the said discovery and location of the said "Ibex" Lode claim, this protestant is the owner of and entitled to the possession of all of that portion of the ground and premises included in the application of the said Royal J. Rutter and F. W. Bradley for a patent on the Kirby Fraction Lode mining claim, as shown by said plat and marked Exhibit "C," and by the certified

abstract of title hereto annexed, marked Exhibit "E" and made a part of this protest.

That by reason of the location and ownership of the said "Shoshone" Lode mining claim and the said "Ibex" Lode mining claim by this protestant, the said applicants for patent on the said "Kirby Fraction" Lode mining claim are not entitled to receive a patent for that portion of the said "Kirby Fraction" claim covered by and included within the said "Shoshone" and the said "Ibex" locations.

VII.

Because the said "Kirby Fraction" Lode mining claim, for which application for patent has been made, and against which this protest is filed, is not now, and was not on the 21st day of March, 1894, or at any time since, a valid location or an existing mining claim.

311 And for the further reason that neither the applicants for patent for the said "Kirby Fraction" Lode claim, nor any person authorized to represent them or any owners or claimants of the said "Kirby Fraction" Lode claim, did perform any annual labor or expend any sum in labor and improvements upon the said "Kirby Fraction" Lode claim during the years 1894 or 1895, and have not since resumed work thereon.

Therefore, this protestart enters its protest and adverse claim against the issuance of a patent to the said Royal J. Rutter and F. W. Bradley, or either of them, for the said portion of the "Kirby Fraction" Lode claim so in conflict with the said "Shoshone" Lode claim so as aforesaid and the said "Ibex" Lode claim so as aforesaid.

Wherefore, this protestant prays that all proceedings upon said application for patent for the said "Kirby Fraction" Lode mining claim shall be stayed until the question of the title to the right of possession of that portion thereof in conflict with the said "Shoshone" Lode claim and the said "Ibex" Lode claim can be determined in a court of competent jurisdiction.

SHOSHONE MINING COMPANY,
By W. B. HEYBURN, *Vice-President.*

Attest:
[SEAL.] W. B. SAMS, *Secretary.*

312 COUNTY OF SHOSHONE, }
State of Idaho, } *ss.:*

On this 9th day of September, 1896, before me, the subscriber, a notary public, in and for said county and State, personally appeared the above-named W. B. Heyburn, who, being first duly sworn, deposes and says that he is the vice-president of the Shoshone Mining Company, the adverse claimant named in the foregoing protest and adverse claim duly subscribed by him; that he has read the foregoing protest and knows the contents thereof; that the same is true in substance and in fact, as he verily believes, and that the said

adverse claim is made in good faith to protect the better and prior title of the adverse claimant.

W. B. HEYBURN.

Subscribed and sworn to before me this 9th day of September, A. D. 1896.

[NOTARIAL SEAL.] E. M. HEYBURN,
Notary Public.

EXHIBIT "A."

Abstract of title to "Shoshone" lode and mining claim, Yreka mining district, Shoshone county, State of Idaho.

313 1.

Notice of Location.

W. C. Miller (locator). { Dated March 21, 1894; recorded March 26, 1894, Book "N" of Quartz Locations, page 216.

Description.

Locating and claiming 1,500 feet in length, by 600 feet in width, on the "Shoshone" lode, in the Yreka mining district, Shoshone county, State of Idaho, near the town of Wardner and on a mountain lying between Milo and Deadwood gulches.

2.

Deed.

W. C. Miller (grantor) to The Shoshone Mining Company, a corporation (grantee). } Dated March 26, 1894; recorded March 26th, 1894, Book 6 of Deeds, page 269; consideration, 499,900 shares of stock.

All that certain lode mining claim known as and called the "Shoshone," situated in the Yreka mining district, Shoshone
314 county, Idaho; also all that certain lode mining claim known as and called the "Summit," situated in the Yreka mining district, Shoshone county, Idaho.

Being the same claims located on the 21st day of March, A. D. 1894, by the party of the first part, and recorded in the office of the recorder of said county.

Acknowledged before E. M. Heyburn, notary public, Shoshone county, State of Idaho.

3.

Articles of Incorporation.

The Shoshone Mining Company. { Dated March 20th, 1894; March 21st, 1894; one fi

Description.

Object of incorporation: To locate, purchase, bond, lease, r and acquire mineral lands, mining claims, lodes, ledges, wa water rights, the use of water for mining and milling, concent ing power and domestic uses, mills, machinery, smelters, con trators, and mining machinery; to construct, purchase, lease, bond flumes, ditches, aqueducts, tramways, wagon roads, railro for mining purposes, and for use of mines and mills; to buy sell ores, minerals, and metals; to construct, operate, and maint mining, milling, and smelting machinery, and all classes of chinery incident and necessary to mining, milling, smelt
315 and concentrating ores and operating mines and mills sell and dispose of any and all property acquired under provisions of this section; to make and issue obligations for payment of debts contracted by this corporation; to raise mo to pay said debts or discharge such obligations; to mortgage and all property acquired by this corporation.

Principal place of business, Osburn, Idaho. Term of existe 50 years; capital stock, $2,500,000, divided into 500,000 shares of par value of $5 per share.

Incorporators: W. B. Sams, W. C. Miller, E. M. Gilpin, A. Kerns, and C. W. Betts.

Acknowledged before E. M. Heyburn, notary public, Shosh county, Idaho, by all of said incorporators.

Notice of Intention to Hold and Work Mining Claim.

4.

Shoshone Mining Company, by its agent, W. B. Heyburn. } Dated November 28th, 1894; record November 30th, 1894, Book "K" Miss., page 442.

Description.

Giving notice that the owner of the "Shoshone" and "Summi Lode mining claims, situate in Yreka mining district, Shosho county, State of Idaho, being desirous of taking the benefit of t act of Congress, entitled "An act to amend section 2324
316 the Revised Statutes of the United States, relating to mini claims," approved July 18, 1894, hereby declares that it good faith intends to hold and work said mining claim.

(5.)

Proof of Labor.

Charles Sweeney (affiant). } Dated December 12th, 1895; recorded December 26th, 1895, Book "A" of Affidavits, page 107.

Description.

Certifying that at least $100 worth of work or improvements were performed or made upon the "Shoshone" lode, situated in Yreka mining district, county of Shoshone, State of Idaho, and that such expense was made by, for, or at the expense of the Shoshone Mining Company, the owner of said claim, for the purpose of holding claim.

Sworn to before J. E. Gyde, notary public, Shoshone county, Idaho.

STATE OF IDAHO, *County of Shoshone,* } ss:

I, Barry N. Hillard, county recorder in and for Shoshone
317 county, State of Idaho, do hereby certify the foregoing abstract of title, from item No. one to item No. five (inclusive) to be a true and correct abstract of title to said property as the same appears upon the records of said Shoshone county, on the 5th day of September, A. D. 1896, at 12 o'clock m. of said day.

Witness my hand and official seal this 5th day of September, A. D. 1896.

[SEAL.]

BARRY N. HILLARD,
County Recorder.

(Copy.)

In the Matter of the Adverse Claim Filed on Behalf of the "Shoshone" Lode Mining Claim in the Yreka Mining District, Shoshone county, Idaho, against the Application for Patent of Royal J. Rutter and F. W. Bradley on the Kirby Fraction Lode Mining Claim.

This is to certify that I, W. Clayton Miller, a United States deputy mineral surveyor for the State of Idaho, and the same person who made the adverse survey and plat filed with said protest and adverse claim, have examined the amount of work and development upon the said "Shoshone" Lode mining claim, performed by the adverse claimants and its predecessors in interest, and I find that the same consists of drifts, raises, inclines, and stopes, and exceeds in value five hundred dollars.

W. CLAYTON MILLER,
U. S. Dep. Min. Surveyor.

318 STATE OF IDAHO, } ss.
County of Shoshone, }

Subscribed and sworn to before me this 2d day of October, A. D. 1896.

[SEAL.] J. E. GYDE,
Notary Public.

In the Matter of the Adverse Claim Filed on Behalf of the "Ibex" Lode Mining Claim, in the Yreka Mining District, Shoshone County, Idaho, against the Application for Patent of Royal A. Rutter and F. W. Bradley on the "Kirby Fraction" Lode Mining Claim.

This is to certify that I, W. Clayton Miller, a United States deputy mineral surveyor for the State of Idaho, and the same person who made the adverse survey and plat filed with said protest and adverse claim, have examined the amount of work and development upon the said "Ibex" Lode mining claim performed by the adverse claimant and its predecessors in interest, and I find that the same consists of a discovery, drift, and stope under ground above level of Sweeney tunnel; exceeds in value five hundred dollars.

W. CLAYTON MILLER,
U. S. Dep. Min. Sur.

319 STATE OF IDAHO, } ss.
County of Shoshone, }

Subscribed and sworn to before me this 2d day of October, A. D. 1896.

[SEAL.] J. E. GYDE,
Notary Public.

EXHIBIT "D."

Notice of Location of Quartz Claim.

Notice is hereby given that the undersigned corporation, organized and existing under the laws of the State of Idaho, conforming to the mining laws thereof, and of the State of Idaho, and the local rules, regulations, and customs of miners, has this 14th day of August, A. D. 1896, located and does claim seven hundred and eleven (711) linear feet on this lode, lead, or vein of mineral-bearing rock in place, by four hundred and ten (410) feet in width, the same being 220 feet on each side of the center thereof, at the point of discovery, together with all dips, spurs and angles, and all other veins or lodes the top or apex of which lies within said boundaries. This location is named the "Ibex" mining claim, and is situated in the Yreka mining district in Shoshone county, State of Idaho, and bounded and described as follows, to wit:

Commencing at a point immediately over the point of discovery, at
the location notice which is posted at a point 30 feet east of
320 the westerly center end stake, which said westerly center end
stake is 240 feet from corner No. 1 of official survey No. 1126, said location notice being about 1,000 feet directly over the point of

discovery; thence running 36 feet to the said easterly center end stake; thence N. 41 degrees east, 210 feet to the northwesterly corner stake; thence N. 88 degrees 4 minutes east, 383 feet to the northeasterly corner stake; thence south 11 degrees 58 minutes east, 160 feet to the easterly center end stake; thence continuing in the same course 160 feet to the southeasterly corner stake; thence south 87 degrees 50 minutes west, 711 feet to the southwesterly corner stake; thence north 41 degrees east, 220 feet to the westerly center end stake and place of beginning.

The discovery upon which this location is based is made in a solid body of galena ore, uncovered and discovered at a point directly under the point where the notice of location is posted, in a tunnel or drift now being worked and mined by the locator hereof.

The adjoining claimants are the Last Chance lode on the north, the Sold Again lode on the south, the Stemwinder on the east, and the Shoshone on the west, situated one-half mile southwest of Wardner on the west side of Milo creek, in Yreka mining district, Shoshone county, Idaho.

Discovered June 20th, 1896.

Located August 14th, 1896.

THE SHOSHONE MINING COMPANY,
Locator and Claimant.

321 STATE OF IDAHO, }
County of Shoshone, } ss:

I, W. B. Heyburn, do solemnly swear that I am the vice-president of the Shoshone Mining Company, a corporation duly organized and existing under the laws of the State of Idaho; that I am acquainted with the mining ground described in this notice of location and herewith called the "Ibex" lode or claim; that the ground and claim therein described, or any part thereof, has not, to the best of my knowledge and belief been located according to the laws of the United States and of this State, or, if so located that the same has been abandoned or forfeited by reason of the failure of such former locators to comply in respect thereto with the requirements of said laws, and that I have opened new ground to the extent or depth of ten feet as required by the laws of Idaho.

W. B. HEYBURN.

Subscribed and sworn to before me this 14th day of August, A. D. 1896.

E. M. HEYBURN,
Notary Public.

Recorded at the request of W. B. Heyburn, Aug. 21, 1896, at 1 o'clock p. m., in Book "N" of Quartz, page —, records of Shoshone county, State of Idaho.

BARRY N. HILLARD,
County Recorder,
By L. A. DOHERTY,
Deputy Recorder.

322 STATE OF IDAHO, } ss:
County of Shoshone, }

I, Barry N. Hillard, county recorder in and for said Shosh
county, do hereby certify that the foregoing copy of notice of l
tion of the "Ibex" Lode mining claim has been by me compa
with the original, and that it is a correct transcript therefrom
the same appears of record in Book "N" of Quartz, records of
Shoshone county.

In testimony whereof, I hereunto set my hand and affix
official seal at Murray, Idaho, this 21st day of August, A. D. 18

[SEAL.] BARRY N. HILLARD,
County Recorde
By L. A. DOHERTY, *Deputy.*

(Endorsed:) Certified copy. Notice of location of the "Ib
Lode mining claim, Yreka mining district, Shoshone county, Ida

EXHIBIT "E."

Abstract of title to "Ibex" lode and mining claim, Yreka min
district, Shoshone county, State of Idaho.

323 (1.)

Notice of Location.

Shoshone Mining Company, locator and claimant. } Dated Aug. 14th, 1896; record
Aug. 21st, 1896, Book "N"
Quartz Locations, page 487.

Description.

Locating and claiming 711 linear feet on this lode, lead, or v
of mineral-bearing rock in place, by 410 feet in width, the sa
being 220 feet on each side of the center thereof, at the point of
covery, together with all dips, spurs, and angles, and all other ve
or lodes the top or apex of which lie within said boundaries.

This location is named the "Ibex" mining claim, and is situat
in the Yreka mining district in Shoshone county, State of Ida
and bounded and described as follows, to wit:

Commencing at a point immediately over the point of discove
at the location notice which is posted at a point 30 feet east of t
westerly center end stake, which said westerly center end stake
240 feet from corner No. 1 of official survey No. 1126, said locati
notice being about 1,000 feet directly over the point of discove
thence running 36 feet to the said westerly center end stake; ther
N. 41 degrees east 210 feet to the northwesterly corner stak
324 thence north 88 degrees, 4 degrees east, 383 feet to the nort
easterly corner stake; thence south 11 degrees 58 minutes ea
160 feet to the easterly center end stake; thence continuing in t
same course 160 feet to the southeasterly corner stake; thence sou

87 degrees 50 minutes west, 711 feet to the southwesterly corner stake; thence north 41 degrees east, 220 feet to the westerly center end stake and place of beginning.

The discovery upon which this location is based is made in a solid body of galena ore uncovered and discovered at a point directly under the point where this notice of location is posted, in a tunnel or drift now being worked and mined by the locator hereof. The adjoining claimants are, the Last Chance lode on the north, the Sold Again lode on the south, the Stemwinder on the east, and the Shoshone on the west, situated one-half mile southwest of Wardner on the west side of Milo creek; Yreka mining district, Shoshone county, Idaho.

STATE OF IDAHO, }
County of Shoshone, } ss:

I, Barry N. Hillard, county recorder in and for Shoshone county, in the State of Idaho, do hereby certify the foregoing abstract of title of one item to be a true and correct abstract of title of said property, as the same appears upon the records of said county on the 5th day of September, A. D. 1896, at 12 o'clock m. of said day.

325 Witness my hand and official seal this 5th day of September, A. D. 1896.

[SEAL.] BARRY N. HILLARD,
County Recorder.

(Copy.)

Articles of Incorporation.

Know all men by these presents, that we, the undersigned, have this 20th day of March, A. D. 1894, associated ourselves together for the purpose of forming a private corporation and hereby state:

First. That the corporate name of this corporation is the Shoshone Mining Company.

Second. That the object for which this corporation is formed is to locate, purchase bond, lease, rent and acquire mineral lands, mining claims, lodes, ledges, water, water rights, the use of water for mining, milling, concentrating power, and domestic uses, mills, machinery, smelters, concentrators, and mining machinery; to construct, purchase, lease and bond flumes, ditches, aqueducts, tramways, wagon roads, railroads, for mining purposes, and for the use of mines and mills; to buy and sell ores, minerals, and metals; to construct, operate, and maintain mining, milling, and smelting machinery, and all classes of machinery incident and necessary to mining, milling, smelting, and concentrating ores and operating mines and mills; to sell and dispose of any and all property acquired under
326 the provisions of this section; to make and issue obligations for the payment of debts contracted by this corporation; to raise money to pay said debts or discharge such obligations; to mortgage any and all property acquired by this corporation.

Third. The place where the principal business of this corporation is to be transacted is at Osburn, Idaho.

Fourth. The term for which this corporation shall exist shall be for fifty (50) years.

Fifth. The affairs of this corporation shall be managed and controlled by a board of five directors, and W. C. Miller, whose residence is at Wallace, Idaho, and W. B. Sams, whose residence is at Osburn, Idaho, and E. M. Gilpin, whose residence is at Osburn, Idaho, and A. G. Kerns, whose residence is at Wallace, Idaho, and C. W. Betts, whose residence is at Wallace, Idaho, are named and appointed as such directors for the first year.

Sixth. The amount of the capital stock of the corporation shall consist of two millions and five hundred thousand ($2,500,000) dollars, and shall be divided into five hundred thousand (500,000) shares, of the par value of five ($5.00) per share.

Seventh. There is actually subscribed of the said capital stock the amount of one hundred (100) shares as follows:

W. C. Miller, twenty shares.
W. B. Sams, twenty shares.
E. M. Gilpin, twenty shares.
A. G. Kerns, twenty shares.
C. W. Betts, twenty shares.

327 In witness whereof, we have hereunto set our hands and affixed our seals this 20th day of March, A. D. 1894.

W. B. SAMS. [SEAL.]
W. C. MILLER. [SEAL.]
E. M. GILPIN. [SEAL.]
A. G. KERNS. [SEAL.]
C. W. BETTS. [SEAL.]

STATE OF IDAHO, } ss:
County of Shoshone, }

I hereby certify that on this 20th day of March, 1894, before me, the undersigned, a notary public in and for said county and State, personally appeared W. C. Miller, W. B. Sams, E. M. Gilpin, A. G. Kerns, and C. W. Betts, to me known to be the identical persons named in and who executed the foregoing articles of incorporation, and they, and each of them, acknowledged to me that they signed and sealed the same as their free and voluntary act and deed for the uses and purposes therein set forth.

In witness whereof, I have hereunto set my hand and official seal the day and year in this certificate first above written.

[SEAL.] E. M. HEYBURN,
Notary Public.

328 (Endorsed.) Articles of incorporation of the Shoshone Mining Company. Original. Filed March 21st, 1894. Barry N. Hillard, county recorder, Shoshone county, State of Idaho.

TATE OF IDAHO, }
County of Shoshone, } ss:

I, Barry N. Hillard, county recorder in and for said Shoshone unty, do hereby certify that the foregoing copy of articles of in-orporation of the Shoshone Mining Company has been by me ompared with the original, and that it is a true and correct tran-ript therefrom, together with the indorsements hereon, as the me remains on file at my office and in my custody.

In testimony whereof, I hereunto set my hand and affix my offi-al seal at Murray, Idaho, this 17th day of August, A. D. 1895.

[SEAL.]

BARRY N. HILLARD,
County Recorder,
By L. A. DOHERTY, *Deputy.*

TATE OF IDAHO, }
County of Kootenai, } ss:

UNITED STATES LAND OFFICE,
COEUR D'ALENE LAND DISTRICT, IDAHO.

I hereby certify that the foregoing is a true and correct copy of the adverse claim filed by the Shoshone Mining Company against the issuance of patent to Royal J. Rutter and Frederick W. Bradley, applicants for patent for the Kirby Frac-n lode, together with the indorsements thereon, as the same pears on file in this office.

Dated at the United States land office at Coeur d'Alene, Idaho, s 10th day of October, 1896.

JAMES GRAHAM, *Register.*

Endorsed:) Certified copy. Articles of incorporation. Shoshone ning Company.

Notice of Location.

Notice is hereby given that the undersigned is a citizen of the ited States over the age of twenty-one years, and has discovered dge of mineral-bearing rock in place, bearing silver, lead, and er precious metals, at a depth of about twelve hundred (1,200) , directly over the point where this notice is posted, and, for the pose of locating a mining claim based upon said discovery, has s day located and claims fifteen hundred (1,500) feet upon said ge, together with three hundred (300) feet of surface ground on northeasterly side thereof, and three hundred (300) feet of sur-ground on the southwesterly side thereof. Said claim is situ-l in the Yreka mining district, Shoshone county, Idaho, near the town of Wardner, and on a mountain lying between Milo and Deadwood gulches, and is more particularly de-scribed as follows:

Beginning at this location notice, which is posted at a point south ty (80) degrees west, one hundred and forty-seven (147) feet n the southwest corner of survey No. 551, the "Last Chance" ing claim, and being about twelve hundred (1,200) feet directly

over the point of discovery; thence running south sixty-two (62) degrees east, four hundred (400) feet to the southeast corner end stake; thence north forty-one (41) degree seast, three hundred (300) feet to the northeast corner stake; thence north sixty-two (62) degrees west, ten hundred (1,000) feet to corner No. two (2) on the southeast end, end line of survey No. 615, the "Skookum" Lode claim; thence south eighteen (18) degrees and thirteen (13) minutes west, along the southeast end line of the said "Skookum" Lode claim, one hundred (100) feet, more or less, to corner No. three (3), being the southeast corner No. four (4) of the said "Skookum" lode; thence along the southerly side line of the said "Skookum" lode north sixty (60) degrees west, five hundred and thirty (530) feet, more or less, to corner No. four (4); thence south forty-one (41) degrees west, two hundred and ten (210) feet, more or less, to the northwest center and post; thence continuing in the same direction three hundred (300) feet to the southwest corner post; thence south sixty-two (62) degrees east, twelve hundred feet, more or less, to a point on the northerly side line of the "Sold Again" Lode
331 claim, marked by a post; thence northeasterly along the said north side line of the said "Sold Again" claim four hundred feet, more or less, to a post; thence north forty-one (41) degrees east, sixty (60) feet more or less, to the southeast center end stake, the place of beginning.

All of which said stakes are upward of four (4) inches square and four (4) feet high.

And I hereby claim four hundred (400) feet running in a southeasterly direction, and eleven hundred (1,100) feet running in a northwesterly direction from this notice and the point of discovery thereunder, along the course of said ledge. The said mining claim to be known as and called the "Shoshone" Lode claim.

This claim is located and marked on the ground this twenty-first (21st) day of March, A. D. one thousand eight hundred and ninety-four. And it is the intention of the locator to work and mine the said lode through and by means of shafts and tunnels connecting the said discovery point with the surface of the ground.

Dated this twenty-first (21st) day of March, A. D. 1894.

W. C. MILLER, *Locator.*

STATE OF IDAHO, }
County of Shoshone, } ss:

I, W. C. Miller, do solemnly swear that I am acquainted with the mining ground described in the notice of location here-
332 with called the Shoshone ledge, lode, or claim, and that the ground and claim therein described, or any part thereof, has not, to the best of my knowledge and belief, been heretofore located according to the laws of the United States, and of the State of Idaho, or, if so located, that the same has been abandoned or forfeited by reason of the failure of such former locator to comply, in respect thereto, with the reqnirements of said laws.

W. C. MILLER.

Subscribed and sworn to before me this 23d day of March, A. D. 1894.

[NOTARIAL SEAL.] E. M. HEYBURN.

Recorded at the request of W. B. Heyburn, March 26th, 1894, at 9 o'clock a. m.

BARRY N. HILLARD,
County Recorder,
By S. W. SEARS, JR., *Deputy.*

STATE OF IDAHO, }
County of Shoshone, } ss:

I, Barry N. Hillard, county recorder in and for Shoshone county, in the State of Idaho, do hereby certify that the foregoing copy of the notice of location of the "Shoshone" Lode claim has been by me compared with the original, and that it is a correct transcript
333 therefrom as the same appears of record in Book "N" of Quartz Locations, page 216, records of Shoshone county, State of Idaho.

In testimony whereof, I hereunto set my hand and affix my official seal the 8th day of September, A. D. 1896.

[SEAL.] BARRY N. HILLARD,
County Recorder,
By L. A. DOHERTY, *Deputy.*

(Endorsed:) U. S. land office, Cœur d'Alene, Idaho. In matter of protest and adverse claim of the Shoshone Mining Co. *v.* Royal J. Rutter and F. W. Bradley, involving the "Shoshone," "Ibex," and "Kirby Fraction" Lode claims, Yreka mining district, Shoshone county, Idaho. Adverse, $54. Filed in the U. S. land office, Cœur d'Alene, Idaho, September 11, 1896. Notice registered, all parties, September 11, 1896. James Graham, register.

(Endorsed:) Certified copy. Notice of location of the "Shoshone" Lode mining claim, Yreka mining district, Shoshone county, Idaho.

(Endorsed:) Adverse and protest claim of Shoshone Mining Co. against Kirby Fraction Lode mining claim.

PLAINTIFF'S EXHIBIT "D."

(An instruction given by the court to the jury in the case of The Stemwinder Mining Company, plaintiff, *v.* The Emma and
334 Last Chance Consolidated Mining Company, in folio 64 of Transcript of Record on appeal to the Supreme Court of the United States.)

"In addition to what I have read to you, I wish to add a few remarks merely as to your duty as jurors. You may have ever so much knowledge about mining law, and know all about customs and mining rules and regulations, but though you have the wisdom of Solomon they have nothing to do with your deliberations. You

are sworn to decide the case on the evidence, and all of your knowledge, however accurate it may be, has nothing to do with this case. You must go according to the law and evidence in the case. I have stated the law to you very plainly, as it seems to me, as to what constitutes a valid location, and I shall further charge you this: That there is really but one question in this case. The whole case is practically limited to that question—that is, who first made a valid location on this ground? That is really the whole question, stripped of the evidence and stripped of all the facts of the case; that is the point. Now, to determine the point you must go into all the evidence you have heard; reconcile it, if you can, and ascertain, if you can, who, in your judgment, to the best of your belief, first located—made a valid location—upon that ground. If you find that the plaintiff made the first valid location, the plaintiff is prior in point of time, and whatever may be all the facts in this case—I do not care what they are—the plaintiff is entitled to a verdict at your hands. If you find, however, that the defendant made the first valid location, then the defendant is entitled to a
335 verdict at your hands. I state that to you so as to simplify the case and bring it down to the direct point in issue."

(*Proceedings in said Record from Folio* 43 *to Folio* 48.)

Fifty-sixth judicial day, Saturday, September 29th, A. D. 1888. June term, A. D. 1888.

THE STEMWINDER MINING COMPANY
vs.
THE EMMA AND LAST CHANCE CON. M'NG CO. ET AL. } No. 282.

At this day, all parties hereto being present in open court, and the jury having been duly polled, the trial of this cause was resumed.

After the arguments of counsel the court charged the jury in writing, and they were placed in charge of an officer duly sworn for that purpose, and retired to consider of their verdict, and at this time by stipulation of counsel, it was ordered that any bill of exception herein might be presented to the court and be filed during this term of court, and the jury regularly impaneled herein returned into court, and, being duly polled, answer to their names and ask for further instructions, and after being duly instructed by the court they were placed in charge of an officer duly sworn for that
336 purpose, and again retired to consider of their verdict, and afterwards the jury returned into court with a verdict signed by their foreman, and, being called, answer to their names and say:

In the District Court of the First Judicial District of the Territory of Idaho in and for Shoshone County.

THE STEMWINDER MINING COMPANY, a Corporation, Plaintiff,
vs.
THE EMMA AND LAST CHANCE CON. MIN. CO. ET AL.

We, the jury in the above-entitled cause, find the right of possession to the area of ground in conflict in this action to belong to the defendants.

WILLIAM A. PARKER, *Foreman.*

The jury were then excused from the further consideration of this case.

And on motion of the plaintiff the court granted a stay of proceedings for ten days.

And afterwards, and on the 5th day of October, A. D. 1888, a decree herein was filed, which is in the words and figures as follows, to wit:

337 (Title of Court and Cause.)

This cause came on regularly for trial. The said plaintiff appeared by its attorneys, Albert Hagan and Albert Allen, Esquires, and the defendants by Woods & Heyburn, Esquires, its attorneys. A jury of twelve persons was regularly impaneled and sworn to try the said action; whereupon witnesses upon the part of the plaintiff and defendant were sworn and examined, and, after hearing the evidence and arguments of counsel and the instruction of the court, the jury retired to consider of their verdict, and subsequently returned into court with a verdict, signed by the foreman, and, being called, answer to their names and say:

"We, the jury in the above-entitled cause, find the right of possession to the area of ground in conflict in this action to belong to the defendant.

"WILLIAM PARKER, *Foreman.*"

Wherefore, by reason of the law and by virtue of the premises aforesaid, it is ordered, adjudged, and decreed that the said defendant, the Emma, Last Chance Consolidated Mining Company, have the right of possession of the mining ground in controversy between said plaintiff and defendant and in said complaint described as follows, to wit: Beginning at a point, being corner No. 3 of the official survey of the Emma Lode claim, as the same was
338 surveyed and marked upon the ground in the making of the official survey for a United States patent; thence north 82 degrees 23 minutes east, 82.4 feet to a point on the north side line of the said Emma Lode claim as surveyed for patent; thence south 71 degrees 50 minutes east, 534.9 feet to a point; thence south 11 degrees 58 minutes east, 59.6 feet to a point on the south side line of the said Emma Lode claim, said point being south 80 degrees 40

minutes east, 612.8 feet from corner No. 2 of said official survey o the Emma Lode claim; thence along the south side line of said Emma Lode claim north 80 degrees 40 minutes west, 612.8 feet to corner No. 2 of the official survey of the said Emma Lode claim thence north 1 degree east 114 feet to the place of beginning, and containing an area of 1.38 acres of land, and that the same be adjudged and decreed to be a part of the said Emma Lode claim, as the same was located and claimed by Jno. Flaherty, J. L. Smith M. Carlin, and John M. Burke on the 17th day of September, 1885 and that the right of possession to all of said Emma Lode claim as surveyed for a patent and described in the application for patent belongs to the defendant in this action, and that the defendant have and recover of and from said plaintiff its costs and disbursements in this action, amounting to the sum of $1,141.30.

JOHN L. LOGAN, *Judge.*

A true copy.

339 Attest my hand and the seal of said district court this 5th day of October, A. D. 1888.

F. H. GRIERSON, *Clerk,*
By BARRY N. HILLARD, *Deputy.*

(Endorsed:) No. 282. In district court, Shoshone county, Idaho Ter. The Stemwinder Mfg. Co. *vs.* The Emma and Last Chance Con. Mfg. Co. *et al.* Decree. Filed October 5th, A. D. 1888. F. H. Grierson, clerk, by Barry N. Hillard, deputy.

And afterward, and on October 5th, 1888, the certificate to the judgment-roll was filed herein, which is in words and figures as follows, to wit:

(Title of Court and Cause.)

I, the undersigned, clerk of the district court of the first judicial district of said Territory, in and for said county, do hereby certify the foregoing to be a true copy of the judgment entered in the above-entitled action and recorded in Judgment Book "B" of said court, on page 47, and I further certify that the foregoing papers hereto annexed constitute the judgment-roll in said action.

Witness my hand and the seal of the district court this 5th day of October, 1888.

[SEAL.]

F. H. GRIERSON, *Clerk,*
By BARRY N. HILLARD, *Deputy.*

340 (Endorsed:) No. 282. District court of the first judicial district, county of Shoshone. The Stemwinder Mining Company, plaintiff, *vs.* The Emma and Last Chance Con. Mng. Co. *et al.*, defendants. Judgment-roll. Filed October 5th, A. D. 1888. F. H. Grierson, clerk, by Barry N. Hillard, deputy clerk. (End of folio 47.)

In the Supreme Court of the Territory of Idaho, January Term, A. D. 1889.

THE STEMWINDER MINING COMPANY, Plaintiff and Appellant,
vs.
THE EMMA AND LAST CHANCE CONSOLIDATED MINING COMPANY *et al.*, Defendants and Respondents.

Opinion.

WEIR, *C. J.*:

This is an appeal from a judgment in favor of the defendant and against the plaintiff entered upon the verdict of a jury, and also from an order denying a motion for a new trial. The cause of action arose in the county of Shoshone, in the first district. The complaint substantially alleges that the plaintiff is a corporation,
duly organized and existing under the laws of the State of
341 Oregon, and that the defendant is likewise a corporation organized and existing under and by virtue of the laws of the same State; that since the 11th day of March, 1887, plaintiff has been, and is now, the owner of the premises in dispute, subject only to the paramount title of the United States, and is entitled to the possession of a certain mine and mining claim called the "Stemwinder mining claim," and then proceeds to set out the description of the claims of the plaintiff and of the defendant, and that the grantors of the defendant, on the 6th day of March, 1887, filed with the register of the land office an application for a patent, and in such application wrongfully and without right set up title to certain premises which the plaintiff claims is the property of itself, and that the suit is brought for the purpose of ascertaining the ownership of the said alleged tract of land in dispute; and then prays judgment against the defendant, first, that the plaintiff is the owner of and lawfully in and entitled to the possession of the premises described, the area in conflict between the Stemwinder mining claim and the alleged Emma mining claim and the lode therein, and quieting and confirming plaintiff's title thereto and the possession thereof, and that the defendants have no title to or right of possession of said conflicting area or the lode therein, or any part thereof. The defendants demurred to the complaint in the action, which demurrer was overruled by the court, and the defendant was
given five days in which to prepare and serve an answer.
342 The answer, though very long, contains substantially a general denial, and sets up title or claim to the premises in dispute by reason of a location thereof by certain parties and the transfer thereof to the defendant, and that such location was prior to the location made by plaintiff's grantors; and further claims that the location under which the plaintiff claims was never at any time located, staked, marked, and defined in accordance with the requirements of law, if at all, until long subsequent to the aforesaid location of the Emma mining claim by the locators thereof, and that the plaintiff is not, nor has it ever been, in possession of the area so in conflict as aforesaid. Upon these issues the case

came to trial. The plaintiff offered such evidence as it saw fit as
the location of its claim and the defendant did the same.

Strictly, there was but one issue in the case, and that was, which
the parties made the first valid location of the area in dispu
The evidence on that point was conflicting, and presented a qu
tion of fact for the jury. Upon this question the jury rendered
verdict in favor of the defendant and against the plaintiff. Whe
upon the plaintiff made a motion for a new trial upon the prop
papers, which motion was denied.

The questions presented for our consideration are the alleg
errors made by the court in the admission of certain testimony, a
as to the charge made by the court to the jury and its refusal
charge certain requests made by the plaintiff.

343 The only exception taken to the admission of alleged i
proper evidence by the court was in regard to a compromi
monument erected along the alleged line between the claim
plaintiff and defendant. The defendant offered evidence to sho
that the compromise point was erected by agreement; not for t
purpose of establishing a location, but for the purpose of showi
where the location was, as it was then understood by all the parti
This evidence the court, upon objection by the plaintiff, exclude
but it appears that a map used for other purposes on the trial co
tained upon its face the compromise monument, and that it w
frequently referred to as the compromise monument, and as so r
ferred to the question was really before the jury. It appears th
the court permitted evidence by the engineer who surveyed the d
fendant's claim in December, 1886, in regard to having this co
promise monument pointed out to him by the parties then claimi
the ground, as the compromise monument agreed upon by suc
parties themselves. We are by no means prepared to say that t
evidence as offered by the defendant was not admissible. Suc
evidence was not within the rule laid down by the authorities cit
by the plaintiff, and did not seek in any manner to establish th
location of a mining claim by parol, but, on the contrary, reall
sought to show that the claims as located were in some dispute, an
the parties ran the lines by agreement so as not to interfere wit
each other, and placed this monument only for the purpos

344 of showing that they had done so. But even though th
was error, the testimony admitted by the court was clearl
right and proper. The engineer, in making the survey, referred t
this compromise monument only to show how and in what manne
he had made the survey. We see nothing in the admission of thi
testimony which was improper or which in any manner tended t
prejudice the rights of the plaintiff.

We shall not notice the many exceptions taken by the plaintif
in regard to the charge of the court and the refusal of the court t
make certain charges at the request of the plaintiff. Most of the
are utterly without merit, for the reason that the court had alread
fully charged upon the propositions requested, and also for th
reason that many of the requests practically called for a decisio
upon the same proposition of law rejected by the court, couched i

different language. The charge of the court as delivered was very full and complete, and really presented to the jury every question necessary for their consideration, and the many requests made by the plaintiff were but a repetition of the charge already given. We shall notice, however, three of the plaintiff's exceptions: First, those which relate to the defendant's location being in excess of the quantity of land allowed by law; second, the right of a corporation to locate a mining claim; and third, the question raised by the plaintiff as to what distance the plaintiff was entitled to from the middle of the vein or point of discovery.

345 It is perfectly clear in our mind that the location of the defendant was not wholly void, for the reason that the defendant's grantors did, in marking the boundaries of the location, place their stakes more than 1,500 feet in length and 600 in width. Under the evidence in this case no fraud is alleged or claimed. No rights of third parties were infringed upon, and the evidence is conclusive that the location was made by measurements by the eye and by stepping off the distances; and it also appears that in December, 1886, the alleged location was surveyed and the lines were drawn in such manner that the amount of the claim was not in excess of the amount allowed by law. This occurred prior to the plaintiff making its amended location, and under the facts of this case there can be no question that the location or claim of the defendant was void only as to the excess. The authorities would seem to be conclusive upon that point. (Atkins *v.* Hendree, 1 Idaho, 95; Mining Co. *v.* Tarbett, 98 U. S., 464; Richmond Mining Co. *v.* Rose, 114 U. S., 576.)

It appears conclusively from the location notice placed upon the ground by the defendant's grantors at the time of location that they only claimed 1,500 feet along the lode or vein, and 300 feet on each side, and no more. There is nothing in the contention that the decision of the court in the last case does not apply in principle to the present case. It is true that that case was decided under the act of 1866, and the present case arises under the act of 1872; yet the principle is the same. In that the court says:

346 We hardly think it needs discussion to decide that the inclusion of a larger number of linear feet than two hundred renders a location, otherwise valid, totally void. This may occur, and often must occur, by accident of the surveyor, or other innocent mistake, where there exists no intention to claim more than two hundred feet. Must the whole claim be made void by this mistake, which may injure no one, and was without any design to violate the law? We can see no reason in justice or in nature of the transaction why the excess may not be rejected and the claim be held good for the remainder unless it interferes with the rights previously acquired.

We do not, therefore, think it necessary to further consider this point, except to say that we find no error in the refusal of the court to charge on the subject as was requested by the plaintiff. * * * Moreover, there was no merit in the plaintiff's requests. The location of the plaintiff as proven showed the same state of facts in re-

lation to itself as did the defendant's, and the court would not have been justified under the evidence in charging the jury that the defendant's location only would be void.

The defendant requested the court to charge the jury that the plaintiff was a corporation organized under the laws of the State of Oregon, and that no such corporation is entitled to the privilege of making a mineral location of lands belonging to the United States. This the court charged. Without deciding whether this was error or not, we can safely say that it was not such an error in this
347 case as would justify the court in reversing the judgment. There was no evidence that the corporation made the location. On the contrary, the evidence was conclusive that the corporation did not make the location, and the charge, even though error, could not in any way have injured the plaintiff. Besides this, the defendant claimed was in precisely the same condition, and the evidence was conclusive there that the defendant did not make the location, but stood in the same position that the plaintiff did, namely, it had purchased its claim from citizens who had made locations. The charge of the court being perfectly clear as to the real facts of the case, and the case being properly submitted to the jury, to charge as the court did, under all the circumstances, was not in error, as such charge could not in any manner have injured any one. We therefore conclude that as to this point there was no error to justify us in reversing the judgment.

As to the third and last point which the plaintiff raises, we think there is nothing whatever in it, and that the charge as delivered by the court was perfectly correct under the facts in every respect. Under the circumstances the court would have been perfectly justified in refusing to consider the requests made by the plaintiff at that time. But even as delivered and refused we find no error. The court stated to the jury that at the time of the location measurements must be from the point of discovery—the middle of
348 the point of discovery—unless there is evidence before you that the vein has been actually established and run. But if the evidence is simply that there was a point of discovery, then the only knowledge you can have of the vein is that part which crops out at the point of discovery, and the parties must be entitled to 300 feet on each side of the middle of the vein at the point of discovery as they had so located this claim. It must not exceed 300 feet—that is, they are entitled to 300 feet on each side of the vein. This we think was proper, and was the only charge which could have been given to the jury under the state of the evidence.

The plaintiff seems to lay great stress on the fact that the court refused to charge the 22d proposition required by it. In answer to this claim it is only necessary to say that from an examination of the record it will be found that the court charged the proposition except as to two or three lines which should not have been changed. At the conclusion of the charge the court verbally charged the jury as follows: That there is really but one question in this case, and that is, Who first made a valid location on this ground? That is really the whole question. Now, to determine that point you must

go into all the evidence you have heard, reconcile it if you can, and ascertain, if you can, who, in your judgment, made a valid location upon that ground. If you find that the plaintiff made the first valid location, the plaintiff is prior in point of time, and, whatever may be the facts in this case, the plaintiff is entitled to a verdict at your hands. If you find, however, that the defend-
349 ant made the first valid location of the ground in dispute, then the defendant is entitled to a verdict at your hands. I state this to you so as to simplify the case and bring it down to the direct point in issue.

Under the pleadings and the evidence this charge was perfectly proper, and the jury could not have been mistaken as to what was the real issue in the case. The evidence was conflicting, but fully justified the verdict of the jury. The contention of the plaintiff that because the location notice, as recorded by the defendant, described the defendant's claim as adjoining the Stemwinder the defendant is estopped from claiming that its location is prior in point of time to plaintiff's, under the evidence and the explanation which was given of that statement is utterly without merit.

We think there is no error in the record which would justify this court in reversing the judgment. The judgment is therefore affirmed, with costs.

Judgment affirmed.

TERRITORY OF IDAHO, } ss:
County of Ada, }

I, S. H. Hays, clerk of the supreme court of the Territory of Idaho, do hereby certify the foregoing seven pages is a full, true, and correct copy of the opinion in the case of The Stemwinder Mining Claim *v.* The Emma and Last Chance Consolidated
350 Mining Company, John M. Burke, Michael Flaherty, Mike Carlin, and Louis Goldsmith, as rendered and on file in said court and in my custody.

[Supreme Court Seal, Idaho Territory.]

S. H. HAYS,
Clerk of the Supreme Court of Idaho Territory.

(The remainder of this Exhibit "D," being the decision of the Supreme Court of the United States in said case, was not handed to the reporter; hence the same is not incorporated in this record.)

DEFENDANTS' EXHIBIT 2.

Amended Notice of Location of the Stemwinder Claim.

Notice is hereby given that the "Stemwinder Mining Company," a corporation duly organized and existing under the laws of the State of Oregon, by and through its president, Van B. De Lashmutt, and its secretary, J. G. Morland, who are duly authorized herein, hereby files this its amended notice of location of the Stemwinder mining claim, for the following reasons and following purposes, to

wit: That said mining claim was duly located on the 17th day of Sept., 1885, by S. R. Devine who was a citizen of the United States, over the age of 21 years, and notice thereof was posted on the claim and recorded in the records of Shoshone county, Idaho Territory, in vol. C, of Quartz Locations, page 318, on the 26th day of Sept., 1885, to which records reference is hereby had and made a part of this amended location, and as a basis thereof
351 and thereafter said locators, by conveyance duly made and recorded, sold the same, and the said company by divers mesne conveyance- has become, and is now, the owner of said mining claim, and is in the possession thereof, and owns all the right, title, and interest of said locator therein formerly owned and held by them. That since said original location was made the true course, position, and the strike of the vein so originally located marked out, and defined as the Stemwinder vein or lode, has been demonstrated, and determined and within the lines as originally staked and located herein; and by survey it has also been demonstrated that said locators staked out on each side of said vein, ground in excess of 300 feet on each side of said vein, and the object of this amended notice is to conform to the laws relating to mining claims, both national and local, and to mark and define and record the same to the extent and with the boundaries hereinafter set forth, the same being within the boundaries so located, marked, and staked in the original location hereof, and not otherwise; therefore, the said The Stemwinder Mining Company, by and through its said officers duly authorized, hereby give notice that it hereby locates the vein and lode so discovered originally by way of amended location for the purpose aforesaid, and hereby claim the vein within the limits and to the extent as follows, to wit: Beginning at center of southeasterly end of claim, at a post upon which amended location notice is posted; thence north 69 degrees 40 minutes west, 356.85 feet
352 to southwest corner, whence a prominent peak bears south 8 degrees 22 minutes east; another prominent peak bears north 84 degrees 35 minutes east, northwest corner; Bunker Hill lode bears north 69 degrees 40 minutes west, 207.8 feet; thence north 12 de-rees 28 minutes west, 619.6 feet to northwest corner, thence south 69 degrees 40 minutes east, 713 7 feet to the northeast corner; thence south 12 degrees 28 minutes east, 619.6 feet to the southeast corner; thence north 69 degrees 40 minutes west, 356.85 feet to place of beginning, situate about one-half mile southwesterly from town of Wardner, on easterly hillside, in Yreka mining district, county of Shoshone, and Territory of Idaho, and that said company intends to hold and work said above-described mining claim as provided by the local laws and customs and the mining laws, both local and national.

It is further intended herein not to abandon in any manner or by implication any rights, privileges, property, possession, or title, derived, originated, owned, or held under the original location hereof; but that the purpose hereof is to more particularly mark, locate, define, and describe the ground, vein, and premises held by said company, without waiving any rights under said original

ocation, all of which the said company, as the legal successor in nterest and title and possession, derived from said original locator.

353 Original location made Sept. 17th, 1885, and recorded Sept. 26th, 1885. Amended location made May 23, 1887.

THE STEMWINDER MINING COMPANY,
By VAN B. DE LASHMUTT,
President of said Company.

Attest: J. C. MORELAND,
Secretary of said Company and Seal Thereof. [SEAL.]

COUNTY OF SHOSHONE, } ss:
Territory of Idaho, }

Van B. De Lashmutt, being first duly sworn, deposes and says hat the Stemwinder Mining Company is a corporation duly organzed and existing under the laws of the State of Oregon, and is the owner of the Stemwinder mining claim, and in the possession thereof and working the same. That affiant is the duly authorized and acting president of said company, and makes this affidavit for and on behalf of said company. That affiant is acquainted with the mining ground described in the amended notice of location herewith, called he Stemwinder mining claim, ledge, or lode, and that the ground and claim therein described has not, nor has any part thereof, to the best of my knowledge and belief, been heretofore located according o the laws of the United States and of this Territory, or if so located, that the same has been abandoned or forfeited by reason of
354 the failure of such former locators to comply, in respect thereto, with the requirements of said laws. That this notice is simply amendatory of the original location hereof, and intended to fully comply with all of said laws, waiving no rights under the original ocation.

VAN B. DE LASHMUTT.

Subscribed and sworn to before me May 31st, 1887.
[SEAL.] M. C. ATHEY,
Notary Public in and for Shoshone County, Idaho Territory.

Recorded at the request of Chas. Hussey, June 3d, 1887, at 11 o'clock a. m.

THOS. E. McLELLAND,
County Recorder,
By M. J. SWEENY, *Deputy.*

STATE OF IDAHO, } ss:
County of Shoshone, }

I, Barry N. Hillard, county recorder in and for Shoshone county n the State of Idaho, do hereby certify that the above and foregoing copy of the record of the amended location notice of the Stemwinder Lode claim has been by me compared with the original, and that he same is a true and correct transcript therefrom and of the

whole thereof, as the same appears of record in Book "F" of
355 Quartz Locations, at page 159 thereof, records of Shoshone county, Idaho, in my office and in my custody.

Witness my hand and official seal this 27th day of December, A. D. 1895.

[SEAL.]

BARRY N. HILLARD,
County Recorder,
By L. A. DOHERTY, *Deputy.*

(Endorsed:) Certified copy of amended location "Stemwinder lode."

DEFENDANTS' EXHIBIT 3.

Notice of Quartz Location.

That the undersigned citizens of the United States claim, by right of location and discovery, 1,500 feet on this lead or vein or mineral deposit, together with all dips, spurs, angles, variations, etc., and 300 feet on each side of the center of the vein, and all mineral contained in these boundaries 600 feet wide and 1,500 feet long; we claim 850 feet in an easterly, 650 feet in a westerly, direction from discovery, said claim is situated on the west side of Milo creek, about ½ mile north of the forks and about 2 miles from the junction of Milo creek with the South fork of the Cœur d'Alene river, and about 2½ miles southeasterly from Jackass Prairie, Yreka min.
dis. Shoshone county, Idaho Ter'y, and is legally marked by
356 stakes and blazes, by 3 stakes at the east end and 3 stakes at the west end, and notice at discovery; claim to be known as the Stemwinder.

Located Sept. 17, A. D. 1885.

Locator, S. R. DIVINE.

Witness:
C. E. TYLER.

TERRITORY OF IDAHO, } ss:
County of Shoshone, }

I, S. R. Divine, do solemnly swear that I am acquainted with the mining ground described in the notice of location herewith, called the Stemwinder ledge, lode, or claim, and that the ground and claim therein described, or any part thereof, has not, to the best of my knowledge and belief, been heretofore located according to the laws of the United States and of this Territory, or, if so located, that the same has been abandoned or forfeited by reason of the failure of such former locators to comply, in respect thereto, with the requirements of said laws.

S. R. DIVINE.

Subscribed and sworn to before me this 21st day of Sept., 1885.

J. C. COLWELL,
Deputy Mineral Recorder, Yreka District,
Shoshone County, Idaho Territory

357 Filed for record September 21st, 1885, at 3.30 p. m., in the mining records office in Yreka district, Shoshone county, Idaho.

J. C. COLWELL,
Deputy Recorder.

Filed for record in the office of county recorder, Sept. 26th, 1885, at 6 p. m., at the request of J. C. Colwell.

THOS. E. McLELLAND,
County Recorder.

COUNTY OF SHOSHONE, }
State of Idaho, } ss:

I, Barry N. Hillard, county recorder in and for said county and State, do hereby certify that the above and foregoing copy of the record of locations of the Stemwinder lode has been by me compared with the original, and that the same is a true and correct transcript therefrom, and of the whole thereof, as the same appears of record in Book "C" of Quartz Locations, at page 318 thereof, records of Shoshone county, Idaho, in my office and in my custody.

Witness my hand and official seal this the 27th day of December, A. D. 1895.

[SEAL.]

BARRY N. HILLARD,
County Recorder,
By L. A. DOHERTY, *Deputy.*

358 (Endorsed:) Certified copy of location notice of "Stemwinder" Lode claim.

The foregoing have been, by the appellant, presented to me for settlement as the statement of the testimony had upon the trial, and it further appearing that a copy thereof was served upon the counsel for the appellees, who suggested no changes therein, but asked that instead thereof the full notes and report of the testimony and proceedings at the trial, as made by the reporter, be substituted, it is now ordered that the foregoing statement be and is settled as the statement of such testimony and proceeding, and that the same be printed as a part of the record on appeal to the circuit court of appeals, as required by the rules of such court; and it is further ordered that the copy of the reporter's statement of the testimony and proceedings had at the trial, now marked Exhibit "A," and which was filed with the clerk on the 25th day of June, 1897, shall go with the record as a part thereof—but not to be printed—to the said court of appeals, where it may be used by either or the court, as may become necessary, and to be returned to the files of this court when permitted by said court of appeals.

Done this 19th day of October, 1897.

JAS. H. BEATTY, *Judge.*

Filed Oct. 19th, 1897.

A. L. RICHARDSON, *Clerk.*

359 In the District Court of the First Judicial District of the State of Idaho in and for Shoshone County.

THE SHOSHONE MINING COMPANY, Plaintiff,
vs.
ROYAL J. RUTTER and F. W. BRADLEY, Defendants.

Complaint.

Now comes the plaintiff in the above-entitled cause, and for cause of complaint alleges:

I.

That it is a corporation organized, existing, and doing business under the laws of the State of Idaho, and having its principal place of business at Osburn in Shoshone county, Idaho.

II.

That the defendants are each of them citizens of and residents of the State of Idaho.

360 III.

That on the 23d day of July, 1896, the defendants filed in the United States land office, at Coeur d'Alene, Idaho, their application for a United States patent for the "Kirby Fraction" Lode mining claim, alleged to be located and situated in the Yreka mining district, in Shoshone county, Idaho, and in said application for patent the said applicants did falsely allege that they were the owners of the land and premises included in said "Kirby Fraction" mining claim, and entitled to receive a patent from the United States therefor. That after filing said application for patent aforesaid, the applicants caused a notice of said application to be published in "Wardner News," a newspaper published at Wardner in said Shoshone county, Idaho, the first publication of which was made on the 1st day of August, 1896. That during the lawful period of publication, and on the 11th day of September, 1896, this plaintiff did file its protest and adverse claim in the said land office against the issuance of said patent, setting forth as grounds for said protest and adverse claim that the applicants were not the owners of the land and premises included in said pretended "Kirby Fraction" Lode mining claim, but that said land and premises, or the greater portion thereof, was the property of this plaintiff by reason of the valid location of the same by the plaintiff and its grantors, and a compliance with the local rules and customs, together with the laws
361 of the State of Idaho, and of the United States, relating to the location and ownership of mining claims upon the public domain of the United States.

That upon filing the said adverse claim in the United States land office so as aforesaid, all proceedings upon said application for patent were stayed pending the determination of the title to the

right of possession of the said premises so applied for by a court of competent jurisdiction.

Wherefore, this suit is brought by the plaintiff for the determination of said question, and the plaintiff, in support of its claim to the said premises, alleges: That on the 21st day of March, 1894, W. C. Miller, who was then and there a citizen of the United States, over the age of twenty-one years, entered upon the unappropriated public mineral lands of the United States, in the Yreka mining district, in Shoshone county, Idaho, and discovered thereon and therein a ledge of mineral-bearing rock in place, containing silver and lead, and immediately upon making said discovery the said Miller did then and there post a notice of said discovery and of his intention to locate and claim the same at the point on the surface of the ground immediately over and above the point of such discovery, and did then and there locate a mining claim based upon said discovery and called same the "Shoshone," and did then and there further mark said mining claim upon the ground so that its boundaries could be readily traced. And the said locator did, on
362 the 26th day of March, 1894, cause to be recorded in the office of the recorder of Shoshone county, Idaho, what was a substantial copy of the location notice so posted as aforesaid, which said copy so recorded did contain the name of the claim, the name of the locator, the date of location, the number of feet claimed in each direction from the point of discovery, and such a description of the claim located, with reference to natural objects and permanent monuments, as will identify the claim. That on the 26th day of March, 1894, the said W. C. Miller, by good and sufficient deed of conveyance, duly made, executed, and delivered, did convey all of said Shoshone mining claim so located as aforesaid to this plaintiff, and since said 26th day of March, 1894, this plaintiff has been, and now is, the owner of the said "Shoshone" mining claim, and every part thereof, by virtue of the said conveyance and a strict and full compliance with the provisions of the law relative to the maintenance of possession of mining claims upon the public domain of the United States. And since said 26th day of March, 1894, the plaintiff has been continuously in the possession of the said premises, and every part thereof, working and mining upon the same.

That in the application for patent so made by the said defendants, as aforesaid, for the "Kirby Fraction" Lode claim, they have wrongfully overlapped and included that portion of the said "Shoshone" Lode mining claim, the premises of the plaintiff, as shown by the plat hereto, annexed marked Exhibit "A," and made
363 a part of this complaint, which said portion is bounded and described as follows, to wit:

Beginning at the northwest corner of the said "Kirby Fraction" claim as applied for, thence running south 16 degrees 13 minutes west, 443.6 feet; thence south 62 degrees east, 125.44 feet; thence north 87 degrees 50 minutes east, 313 feet; thence north 41 degrees east, 438.6 feet; thence north 62 degrees west, 105.48 feet; thence north 79 degrees 28 minutes west, 502.9 feet; containing an area of

5.24 acres, as shown by the plat hereto annexed and made a part of this complaint, and marked Exhibit "A."

That the defendants have no right, title, claim, or interest in or to the said conflicting area by virtue of any location of a mining claim thereon or otherwise. The said area in conflict is now, and at all times since the said 26th day of March, 1894, has been the property of this plaintiff.

That on the 21st day of August, 1895, the plaintiff filed its application for a United States patent for said "Shoshone" Lode mining claim, including the area in conflict, in the land office aforesaid, and notice of such application was published in due and usual form, during which publication the above-named defendants did file their adverse claim on behalf of the said "Kirby Fraction" Lode claim, against the application of the plaintiff for a patent on the "Shoshone" Lode claim, and within thirty days thereafter did file their bill of complaint in an action commenced by them
364 in support of said adverse claim, which said bill of complaint was filed in the United States circuit court for the district of Idaho, northern division, and thereafter this plaintiff did file its answer to said bill of complaint and the said cause is now pending in said United States court and is undetermined. That every issue as to title and right of possession that can or may be raised between the plaintiff and defendants in this action concerning said area in conflict is fully raised and at issue in the said suit so pending in the United States circuit court as aforesaid.

Plaintiff further alleges that the portion of the ground and premises for which the defendants have applied for patent so as aforesaid, under the name of the "Kirby Fraction" Lode mining claim, wrongfully overlaps and includes the lode mining claim called the "Ibex," belonging to this plaintiff and adjoining said "Shoshone" lode. That on the 20th day of June, 1896, the land and premises now claimed by the plaintiff as the "Ibex" claim was a part of the unappropriated public domain of the United States, containing valuable mineral deposits, and open to exploration, purchase, and location as such. And the plaintiff, on said 20th day of June, 1896, entered thereon and discovered therein a ledge of mineral-bearing rock in place, containing lead and silver in paying quantities, and then and there proceeded to explore and develop the ledge, at said point of discovery until the 14th day of August, 1896, at which time the plaintiff made a location of said "Ibex" Lode mining claim,
365 based upon said discovery, and posted a notice of such location on the surface of the ground immediately above the point of making such discovery, and then and there marked said location upon the ground so that its boundaries could and can be readily traced, and thereafter, on the 21st day of August, 1896, the plaintiff caused to be recorded in the office of the recorder of said Shoshone county what was a substantial copy of the notice so posted on the said "Ibex" claim as aforesaid, which said notice so recorded contained the name of the claim, the name of the locator, the date of the location, and such a description of the said claim with reference to natural objects and permanent monuments as would identify the

same. That immediately upon making said location of the "Ibex" claim the plaintiff entered upon the same, and has continuously occupied and mined upon the ledge so discovered in the same as aforesaid, and is now in possession thereof and entitled to the possession thereof.

That the defendants, in making their application for patent for the "Kirby Fraction" Lode claim as aforesaid, have wrongfully and unlawfully overlapped upon and included the said "Ibex" mining claim in said application. That the area in conflict between said "Ibex" and said "Kirby Fraction" Lode claims is correctly shown upon the plat hereto attached, marked Exhibit "B," and made a part of this complaint, and said area so in conflict is more particularly described as follows, to wit:

Beginning at the northeast corner of the "Kirby Fraction"
366 Lode claim as applied for, thence running south 88 degrees 04 minutes west, 278.74 feet; thence south 41 degrees west, 415.9 feet; thence N. 87 degrees 50 minutes east, 59.99 feet; thence N. 84 degrees 27 minutes east, 399.32 feet; thence north 16 degrees 13 minutes east, 283.6 feet containing an area of 2.35 acres.

That the said defendants wrongfully claim to be entitled to receive a United States patent for the area so in conflict between the said "Kirby Fraction" location as applied for and the said "Ibex" Lode claim.

That the said application for patent so made by the defendants as aforesaid for the "Kirby Fraction" Lode claim casts a cloud upon the title of the plaintiff to the said "Shoshone" Lode mining claim and the said "Ibex" Lode mining claim, and encumbers plaintiff's title to said claims.

That by reason of the things complained of on the part of the defendant-, the plaintiff has been greatly injured and damaged, and put to great expense in preparing and filing said protests and adverse claims, and defending against the wrongful acts of the defendants herein complained of.

Wherefore, plaintiff prays the judgment of this court that the defendants are not entitled to the possession of, or the right of possession of, any part of the premises applied for as the "Kirby Fraction" Lode claim, which overlaps and includes or interferes with the said "Shoshone" Lode mining claim, the property of the plaintiff, or upon the said "Ibex" Lode mining claim, the property of the
367 plaintiff, or to any part thereof. And for the further judgment of this court that the plaintiff is entitled to the possession and right of possession of the said "Shoshone" Lode mining claim, and of the portion thereof in conflict with the said "Kirby Fraction" Lode mining claim, and that the plaintiff is further entitled to the possession and right of possession of the said "Ibex" Lode mining claim and of the position thereof in conflict with the said "Kirby Fraction" Lode mining claim, by virtue of the valid locations upon the said "Shoshone" and "Ibex" Lode mining claims hereinbefore set forth and described.

Plaintiff further prays that the defendants may be adjudged not entitled to maintain or prosecute their said application for patent

for the said "Kirby Fraction" Lode mining claim, pending
determination of the action so pending in the United States circ
court for the district of Idaho, in and for the northern division,
aforesaid.

Plaintiff further prays that he may have and recover its co
and disbursements in preparing and filing said adverse claim a
of this action.

W. B. HEYBURN,
Attorney for Plaintiff

STATE OF IDAHO,
County of Shoshone, } ss:

W. B. Heyburn, being first duly sworn, on his oath depos
368 and says that he is the vice-president of The Shoshone M
ing Company, the above-named plaintiff; that he has re
the foregoing complaint and knows the contents thereof, and th
the same is true of his own knowledge.

W. B. HEYBURN.

Subscribed and sworn to before me this 12th day of Septembe
1896.

[SEAL.]

E. M. HEYBURN,
Notary Public.

STATE OF IDAHO,
County of Shoshone, } ss:

I, Barry N. Hillard, clerk of the district court of the first judici
district of the State of Idaho, in and for the county of Shoshon
do hereby certify the above and foregoing to be a true and corre
copy of a complaint filed September 17, 1896, at 1 o'clock p. m.,
my office and in my custody.

In testimony whereof, I hereunto set my hand and affix the sea
of the said district court at Murray, this 19th day of October, A. I
1896.

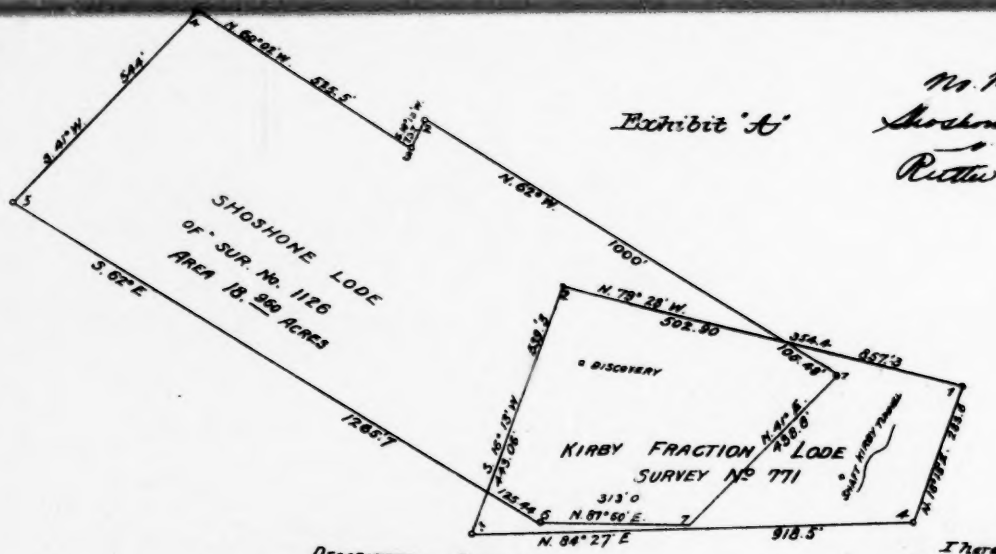
[SEAL.]

BARRY N. HILLARD,
Clerk District Court,
By L. A. DOHERTY, *Deputy.*

(Here follow diagrams marked pp. 368*a* & 368*b*.)

No. 708.
Shoshone Co. } p 368a
Ruttler et al

Exhibit "A"



DESCRIPTION OF CONFLICT.

BEG AT N.W. COR. OF KIRBY FRACTION.

TH.	S. 15° 13' W.	443.06
"	S. 62° E.	125.44
"	N. 87° 59' E.	313.
"	N. 41° E.	438.6
"	N. 62° W.	105.48'
"	N. 79° 28' W.	502.9

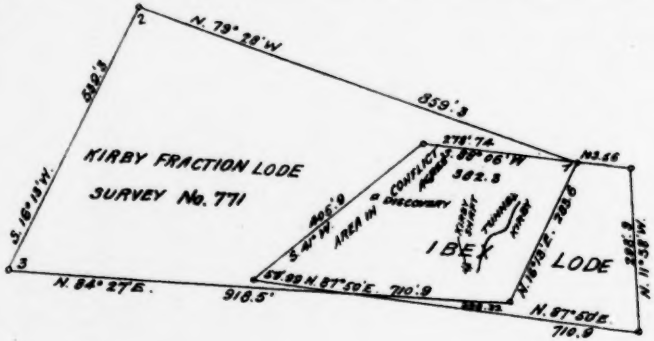
TOTAL AREA SHOSHONE 18.980 ACRES
AREA IN CONFLICT WITH THE KIRBY FRACTION LODE 5.24 ACRES

NORTH

SCALE 200 FT. 1 INCH

I hereby certify that the above diagram correctly represents the conflict claimed to exist between the Kirby Fraction Lode, Survey No. 771 Royal J Rutler et al Claimants, and the Shoshone Lode of Consolidated Survey No. 1126 Shoshone Mining Company Claimant as actually surveyed by me.

W. Clayton Miller
U.S. Deputy Mineral Surveyor.
Spokane Wash. Aug. 20th 1906



DESCRIPTION OF CONFLICT

BEG. AT N.E. COR. OF KIRBY FRACTION

	S. 88° 04' W.	278.74 FT.
TH	S. 41° W.	405.9 "
"	N. 87° 50' E.	59.99 "
"	N. 84° 27' E.	399.32 "
"	N. 16° 13' E.	283.6 "

AREA IBEX LODE	3.77 ACRES
AREA IN CONFLICT	2.35 ACRES

SCALE 200 FT. 1 INCH

Exhibit "B"

I hereby certify that the above diagram correctly represents the conflict claimed to exist between the Kirby Fraction Lode, Sur. No. 771, Royal J. Rutter et al, Claimants and the Ibex Lode, Shoshone Mining Company, Claimant, as actually surveyed by me, situated in Yreka Mining District, Shoshone, Idaho

W. Clayton Miller
U.S. Dep. Min. Surveyor
Aug. 20th 1896.

No. 208
Shoshone Bk. p. 368
Rutter et al

369 *Petition for the Removal of Cause to the United States Circuit Court.*

In the District Court of the First Judicial District, State of Idaho, County of Shoshone.

THE SHOSHONE MINING COMPANY, Plaintiff,
vs.
ROYAL J. RUTTER and F. W. BRADLEY, Defendants.

Petition for removal.

To the Honorable Alexander E. Mayhew, judge of the court aforesaid:

Your petitioners, Royal J. Rutter and F. W. Bradley, defendants in the above-entitled action, respectfully represent and show to your honorable court:

That this is a civil action brought in this court in pursuance of an adverse claim, filed in the United States land office at Cœur d'Alene City, State of Idaho, by the plaintiff herein, to the application of the petitioners for a United States patent to a certain parcel of
370 mineral land, situated in Shoshone county, in said State.

That said action is in pursuance of the provisions of section 2326 of the Revised Statutes of the United States, for the determination of controversies arising between claimants to the right of possession of mineral lands claimed for patent by the parties thereto.

Your petitioners allege that they are each citizens of the United States and residents and citizens of the county of Shoshone, State of Idaho, and that the Shoshone Mining Company is a corporation doing business and claiming to be organized and existing under the laws of the State of Idaho.

That the value of the premises described in the complaint, exclusive of interest and costs, exceeds the sum of two thousand ($2,000) dollars.

That this action is a special action created and authorized by the statutes of the United States, to facilitate the sale and disposition of the public mineral lands by the Land Department, and involves the right of possession conferred by said statutes to claimants of the same who desire to obtain patents for the lands claimed by them, and is therefore within the jurisdiction of the courts of the United States.

That this action involves the questions of what is a lawful location of a mineral claim; what discovery of mineral is required to support such location, and what rights follow such location, discovery and attempted appropriation, and the proper construction of the acts of Congress relating thereto.

371 Your petitioners being claimants of the title to the premises in controversy, and the plaintiff being an adverse claimant thereto under statutes.

Your petitioners herewith present a good and sufficient bond as provided by the statute in such cases, that they will, on or before the first day of the next ensuing session of the United States circuit court, for the northern division of the district of Idaho, file therein a transcript of the record of this action, and for the payment of all costs which may be awarded by the said court, if the said circuit court shall hold that this suit was wrongfully or improperly removed thereto.

Your petitioners therefore pray that this court proceed no further herein, except to make the order of removal as required by law and to accept the bond presented herewith, and direct a transcript of the record herein to be made for said court as provided by law, and as in duty bound your petitioners will ever pray.

ROYAL J. RUTTER.
F. W. BRADLEY.

STATE OF IDAHO, } ss:
County of Shoshone, }

Royal J. Rutter and F. W. Bradley, being each first duly sworn according to law, deposes as follows:

I am one of the defendants in the above-entitled action,
372 and have read the foregoing petition, and the same is true of my own knowledge; except such matters as are therein stated on information and belief, and those matters I believe it to be true.

ROYAL J. RUTTER.
F. W. BRADLEY.

Subscribed and sworn to before me this 19th day of October, A. D. 1896.

[SEAL.]

M. J. SINCLAIR,
Notary Public.

(Endorsed:) No. 1232. In the district court of the 1st judicial district for the State of Idaho, Shoshone county. Shoshone Mining Company, plaintiff, *v.* Royal J. Rutter and F. W. Bradley, defendants. Petition for the removal of cause to the United States circuit court. Filed Oct. 23d, 1896. Barry Hillard, clerk.

373 The District Court of the First Judicial District, County of Shoshone, State of Idaho.

THE SHOSHONE MINING COMPANY, Plaintiff,
vs.
ROYAL J. RUTTER and F. W. BRADLEY, Defendant-.

Bond on Removal of Cause.

Know all men by these presents, that we, Royal J. Rutter and F. W. Bradley, as principals, and Fred'k Burbridge and Chas. F. Sinclair, as sureties, residents, and freeholders of the county of Shoshone, State of Idaho, are held and firmly bound unto The Shoshone

Mining Company, plaintiff in the above-entitled cause, its successors and assigns, in the sum of five hundred ($500) dollars, lawful money of the United States of America, for the payment of which well and truly to be made, we and each of us bind ourselves and each of us, our heirs, executors, and administrators, jointly and severally, by these presents.

374 The conditions of this obligation are such that:

Whereas, the said Royal J. Rutter and F. W. Bradley have applied to the judge of the district court aforesaid, by a petition in the cause aforesaid, praying that the same may be removed to the circuit court of the United States for the district of Idaho, northern division, for further proceedings on grounds in the said petition set forth, and that all further proceedings in said action in said district court be stayed.

Now, therefore, if the said Royal J. Rutter and F. W. Bradley shall enter in said circuit court of the United States for the district of Idaho, aforesaid, on or before the first day of the next regular session, a copy of the files and records in this action, and shall pay or cause to be paid all costs awarded therein, if said circuit court shall hold — was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise shall remain in full force and effect.

ROYAL J. RUTTER.
F. W. BRADLEY.
FRED'K BURBRIDGE.
CHAS. F. SINCLAIR.

Subscribed and sworn to before me this 19th day of October, A. D. 1896.

[SEAL.]

M. J. SINCLAIR,
Notary Public.

375 STATE OF IDAHO, } ss:
County of Shoshone, }

Fred Burbridge and Chas. F. Sinclair, the sureties named in the foregoing bond, being first duly sworn, each for himself deposes and says as follows: I am the same person whose name is subscribed to the foregoing bond, and I state I am a householder and resident of the county and State aforesaid, and that I am worth the sum of five hundred ($500) dollars named therein as the penalty thereof, over and above all my just debts and liabilities, exclusive of property which is exempt from execution.

FRED'K BURBRIDGE.
CHAS. F. SINCLAIR.

Subscribed and sworn before me this 19th day of October, A. D. 1896.

[SEAL.]

M. J. SINCLAIR,
Notary Public.

(Endorsed:) No. 1232. In the district court for the 1st judicial district, State of Idaho, Shoshone county. Shoshone Mining Com-

pany, plaintiff, *vs.* Royal J. Rutter and F. W. Bradley, defendants. Bondon removal of cause. Filed Oct. 23d, 1896. Barry N. Hillard, clerk.

376 In the District Court of the First Judicial District, State of Idaho, County of Shoshone.

THE SHOSHONE MINING COMPANY, Plaintiff,
vs.
ROYAL J. RUTTER and F. W. BRADLEY, Defendants.

Order Allowing Petition for Removal to the United States Circuit Court.

The petition of the defendants in the above-entitled action having been presented to the undersigned judge of the district court of the first judicial district of the State of Idaho, county of Shoshone, and it appearing that the bond accompanying the same is sufficient, is hereby approved, and it appearing that this is a proper case therefor—

It is ordered that the clerk of this court is authorized and directed to make a transcript of the record and files herein, and that said cause be removed to the United States circuit court for the northern division of the district of Idaho for further proceeding in said court.

Done at chambers, this 21st of October, A. D. 1896.

A. E. MAYHEW, *Judge.*

377 (Endorsed:) No. 1232. In the district court of the 1st judicial district for the State of Idaho, county of Shoshone. Shoshone Mining Company, plaintiff, *vs.* Royal J. Rutter and F. W. Bradley, defendants. Order allowing petition for removal to the United States circuit court. Filed Oct. 23d, 1896. Barry N. Hillard, clerk.

In the District Court of the First Judicial District, State of Idaho, in and for Shoshone County.

THE SHOSHONE MINING COMPANY, Plaintiff,
vs.
ROYAL J. RUTTER and F. W. BRADLEY, Defendants.

Summons.

The State of Idaho to Royal J. Rutter and F. W. Bradley, defendants:

You are hereby notified that there is now on file in the office of the clerk of the district court of the first judicial district of said State in Murray, county of Shoshone, the complaint of the above-named plaintiff, wherein it is demanded that it be adjudged to be the owner of and entitled to the possession of that portion of the "Sho-
378 shone" Lode mining claim as intersected by the exterior boundary lines of the "Kirby Fraction" Lode mining claim,

the same being situated in the Yreka mining district, in Shoshone county, State of Idaho, said tract of land so intersected being more particularly described as follows, to wit:

Beginning at the northwest corner of the said "Kirby Fraction" claim as applied for; thence running south 16 degrees and 13 minutes west 443.6 feet; thence south 62 degrees east, 125.44 feet; thence north 87 degrees and 50 minutes east, 313 feet; thence north 41 degrees east, 438.6 feet; thence north 62 degrees west, 105.48 feet; thence north 79 degrees and 28 minutes west, 502.9 feet, containing an area of 5.24 acres.

It is also demanded that said plaintiff be adjudged to be the owner of and entitled to the possession of that portion of the "Ibex" Lode mining claim as intersected by the exterior boundary lines of the said "Kirby Fraction" Lode mining claim, the same being situated in said Yreka mining district, Shoshone county, State of Idaho, said tract of land so intersected being more particularly described as follows, to wit:

Beginning at the northeast corner of the "Kirby Fraction" Lode claim as applied for; thence running south 88 degrees and four minutes west, 278.74 feet; thence south forty-one degrees west, 415.9 feet; thence north 87 degrees and 50 minutes east, 59.99 feet; thence north 84 degrees and 27 minutes east, 399.32 feet; thence
379 north 16 degrees and 13 minutes east, 283.6 feet, containing an area of 2.35 acres.

And that plaintiff may have and recover its costs and disbursements in preparing and filing said adverse claim and of this action.

And you are also notified that unless you appear and answer to said complaint within ten days after service hereof, if served within Shoshone county, and within twenty days if served out of said county, but within said judicial district, and within forty days if served out of said district (exclusive of the day of service), the plaintiff will take default against you and appply to the court for the relief demanded in the complaint herein.

Given under my hand and the seal of the district court of the first judicial district of the State of Idaho, in and for Shoshone county, this 17th day of September, A. D. 1896.

[Seal Dist. Court.]

BARRY N. HILLARD, *Clerk*,
By L. A. DOHERTY,
Deputy Clerk.

STATE OF IDAHO:

OFFICE OF THE SHERIFF OF SHOSHONE COUNTY.

I hereby certify that I received the within summons on the 17th day of September, A. D. 1896, and personally served the same on the 6th day of October, A. D. 1896, on Royal J. Rutter and on F. W. Bradley on the 14th day of October, 1896, being the
380 defendants named in said summons, by delivering to and leaving with said defendants personally, in the town of Kellogg, county of Shoshone, a copy of said summons, and with de-

fendant F. W. Bradley a true and correct copy of the complaint in the action named in said summons.

Dated this 23d day of October, A. D. 1896.

EUGENE SAGE, *Sheriff*,
By JOHN E. MURPHY,
Under Sheriff.

(Endorsed:) No. 1232. Original summons. District court, county of Shoshone. The Shoshone Mining Company, plaintiff, *v.* Royal J. Rutter *et al.*, defendants. Filed on return Oct. 29th, 1896. Barry N. Hillard, clerk. W. B. Heyburn, attorney for plaintiff.

381 In the District Court of the First Judicial District of Idaho in and for Shoshone County.

THE SHOSHONE MINING COMPANY, a Corporation, Plaintiff,
vs.
ROYAL J. RUTTER and F. W. BRADLEY, Defendants.

Præcipe for Default.

To Barry N. Hillard, clerk:

You will please enter the default of the defendant herein for want of answer in the above entitled cause.

W. B. HEYBURN,
Attorney for Plaintiff.

(Endorsed:) No. 1232. In the district court of the first judicial district of the State of Idaho in and for Shoshone county. Shoshone Mining Company, plaintiff, *v.* Royal J. Rutter and F. W. Bradley, defendants. Præcipe for default. Filed Dec. 15, 1896. Barry N. Hillard, clerk district court, by L. A. Doherty, deputy clerk. W. B. Heyburn, attorney for plaintiff.

382 *Clerk's Certificate.*

TERRITORY OF IDAHO,
County of Shoshone, } ss:

I, Barry N. Hillard, clerk of the district court of the first judicial district of the State of Idaho, in and for said Shoshone county, do hereby certify the foregoing to be a true, full, perfect, and correct copy of the following papers on file in my office in the above-entitled cause, constituting the record of said cause, to wit:

Complaint filed September 17, 1896. Petition for removal of cause to United States circuit court, filed October 23, 1896. Bond on removal of cause, filed October 23, 1896. Order for removal of cause. Filed October 23, 1896. Summons, filed October 29, 1896. Præcipe for default filed December 15, 1896, as full, true, perfect, correct, and complete as the same now remain on file in my office.

In witness whereof I hereunto set my hand and affix the seal of

said district court at my office in Murray, Idaho, this 16th day of January, A. D. 1897.

[SEAL.] BARRY N. HILLARD,
Clerk said District Court.

(Endorsed:) No. 102. Filed April 9th, 1897. A. L. Richardson, clerk, by F. H. Grierson, deputy clerk.

383 In the Circuit Court of the United States, District of Idaho, Northern Division.

THE SHOSHONE MINING COMPANY, Complainants,
vs.
ROYAL J. RUTTER and FREDERICK W. BRADLEY, Defendants. } In Equity.

Answer.

Answer of the defendants, Royal J. Rutter and Frederick W. Bradley, to the bill of complaint filed herein by the Shoshone Mining Company.

The above-named defendants, Royal J. Rutter and Frederick W. Bradley, saving to themselves, and each of them, now and at all times hereafter, all and all manner of benefit or advantage of exception that can, or may be had or taken to the many errors, uncertainties, and imperfections in said bill of complaint contained, for answer thereto, or so much thereof as these defendants are advised, it is material or necessary for them to make answer unto, now answering, say:

That the first and second paragraphs of said bill of complaint are true as therein stated.

384 Second. That so much of the third paragraph of said bill of complaint as alleges that these defendants made their application to the United States land office at Cœur d'Alene, Idaho, and at the time alleged; and they further state and admit that they caused a notice of their said application to be published as alleged in said bill of complaint. And they further admit that the complainants herein filed the alleged protest and adverse claim in said land office as alleged in said paragraph and further admit that no further proceedings have been taken in said land office therein, but deny that said proceedings have been lawfully stayed as alleged.

The defendants further answer to the matters alleged in the third subdivision of said bill of complaint deny that the said W. C. Miller, on the said 21st day of March, 1894, or at any other date or time, entered upon the unappropriated mineral lands described in said bill of complaint, and discovered therein or thereon a ledge of mineral-bearing rock in place, containing silver or lead, or that immediately upon making said alleged discovery, or at any time, did then and there post a notice of his discovery or his intention to locate and claim the same at the point alleged; and deny that the

said Miller did then or there locate a mining claim called the Shoshone, or any other mining claim, or that at said date the said Miller by any act then or there done or claimed to have been done, located or acquired any right of claim whatever to the land and premises involved in this action, and deny that he ever became or ever
385 was the owner of or acquired any right in or to the premises involved in this action, and deny that the plaintiff herein ever became through any conveyance made to it, as alleged, at the time alleged or at any time, the owner of the said alleged premises or any part thereof, involved in this controversy, either through the said conveyance or by a strict or any compliance with the provisions of the law, relative to the maintenance of possession of mining claims upon the public domain of the United States; and deny that the said complainant has been continuously, or at all, in possession of any part or portion of the premises in controversy in this action since the 26th day of March, 1894.

These defendants further deny that in their said application for patent to the Kirby Fraction Lode mining claim they have wrongfully overlapped or included any part or portion of the Shoshone mining claim, or any other alleged claim of the plaintiff, and admit that the plaintiff sets up a pretended location and claim under the name of the Shoshone without having acquired any right, title, or interest to the premises in conflict, or any part or portion thereof, and the defendants deny that they are without right, title, claim, or interest in or to the said conflict area; and deny that the same is now, or has at any time since the 26th day of May, 1894, or at any time, been the property of this plaintiff.

Further answering this plaintiff, these defendants admit that the plaintiff has made application as alleged in the Land Office
386 of the United States for a United States patent for the said alleged Shoshone mining claim, and that notice was published as alleged, and that these defendants filed their adverse claim on behalf of the said Kirby Fraction Lode claim against the application of the plaintiff for a patent to the said Shoshone Lode claim, and that they filed their bill of complaint in an action commenced in the United States circuit court for the district of Idaho, as alleged, and that thereafter the defendant therein filed its answer to said bill of complaint in said court, and that said cause is now pending in said court and is undetermined, and that the issue as to the title and right of possession to the premises in dispute herein are the same presented in this cause.

And these defendants, further answering, deny that under their application for patent for the Kirby Fraction Lode mining claim they wrongfully overlap or include the lode mining claim, or any other claim, called the Ibex, belonging to the plaintiff, or adjoining said Shoshone Lode claim, and deny that at the time alleged in the complaint, or at any time since the location of the claim of these defendants, called the Kirby Fraction claim hereinafter set forth, the premises claimed by the complainant herein was a part of the unappropriated domain of the United States, or that the same, or any part thereof, was open to exploration or purchase as such, and

deny that at the time alleged the plaintiff entered thereon or discovered a ledge of mineral-bearing rock, or that it then or there proceeded to explore or develop the same as alleged or otherwise at the point of discovery or that it made a location of said Ibex lode in the manner alleged or in any manner, or that by the acts alleged to have been done it acquired any right or title thereto or therein, or that it has continued or otherwise occupied said ledge, or is now in the possession of said ledge or of said premises, or entitled to the possession thereof.

387

And these defendants admit that on or about the date alleged in the complaint the pretended location was made on the premises described as the Ibex, being then and long before the ground held and owned by these defendants and their grantors as the Kirby Fraction Lode claim, and that the claim of the plaintiff was without right or title, and all their acts and doings to maintain the same were trespasses and wrongs committed against the possession and rights of these defendants.

These defendants admit that their application for patent to the Kirby Fraction lode includes and embraces the premises called by plaintiff the "Ibex," and they allege that they, said defendants, are the owners and entitled to the right of possession thereof.

These defendants deny that their claim to have a United States patent for the area in conflict between the said Kirby Fraction Lode claim and the said Ibex claim is wrongful, and deny that their application for patent casts any cloud upon the title of the plaintiff to the premises alleged to belong to said Shoshone claim, or the said Ibex Lode claim, or that it encumbers the plaintiff's title thereto, and deny that the complainants have any title or any right to the possession of, in, or to, any part or portion of the said Kirby Fraction Lode claim by virtue of the said alleged Shoshone mining claim or said alleged Ibex mining claim.

388

These defendants deny that by reason of the things complained of in the bill of complaint that the complainant has been greatly or at all injured or damaged or put to expense on account thereof or in making defense thereto.

And for further answer, defense allege that on the 11th day of July, 1886, whilst the premises described in complainant's bill as the Kirby Fraction claim, were vacant, unoccupied public mineral lands of the United States, open to exploration and location by citizens of the United States, James Day, Jacob John, Ed. Sullivan and Elar Charlebois, each citizens of the United States, above the age of 21 years, went upon said premises and discovered therein a lode of rock in place bearing silver, lead, and other valuable minerals and metals, and located the same as a mining claim, and they then and there erected monuments to mark the boundaries thereof upon the surface, so that they could be readily traced; that at the place of discovery of mineral upon said claim they posted a notice of discovery of the same, which notice was afterwards duly verified by one of the said locators, as required by law, containing the names of the said locators, the date of location, and a substantial copy of the same recorded on the 8th day of September in the office of the

recorder of Shoshone county, which notice so recorded was
lows, to wit:

389 *Notice of Location of Quartz Claim.*

Notice is hereby given to all whom it may concern that
Day, Jacob Johns, Ed. Sullivan, Elar Charlebois, citizens
United States, over the age of twenty-one years, having disc
a vein or lode of quartz or rock in place, bearing mineral,
the limits of the claim hereby located, have this day, under
accordance with the Revised Statutes of the United States, c
six, title thirty-two, located 1,400 feet (fourteen hundred feet)
feet of this vein or lode, with surface ground 400 feet (four hu
feet) in width, situated in Yreka mining district, county of Sho
and known as the Kirby Fraction quartz mining claim, a
tending twelve hundred and fifty feet (1,250) westerly directio
one hundred and fifty in an easterly direction, and two hund
each side from this notice at the discovery or prospect shaft,
is 150 feet from the east end line, the exterior boundaries
claim being distinctly marked by reference to some natural
or permanent monuments, and more particularly described
lows, to wit: Starting at this notice and running 150 feet we
to post marked east center end; thence northerly 200 feet t
marked northeast corner; thence westerly 1,400 feet to post m
northwest corner; thence southerly 200 feet to post marke
center end; thence southerly 200 feet to post marked sout
corner; thence 1,400 feet easterly to post marked nort
390 corner; thence northerly 200 feet to post marked east
end, or place of beginning, one-half mile west of Wa
and on the west slope of Milo creek, bounded on the north b
Last Chance lode, and the east by what is known as the E
lode.

Located this 11th day of July, 1886.

JAMES DAY.
ED. SULLIVAN.
JACOB JOHNS.
ELAR CHARLEBO

TERRITORY OF IDAHO, }
County of Shoshone, } *ss:*

I, Jacob Johns, do solemnly swear that I am acquainted wit
mining ground described in the notice of location herewith, c
the Kirby Fraction ledge, lode, or claim, and that the ground
claim therein described, or any part thereof, has not, to the be
my knowledge and belief been heretofore located, according t
laws of the United States and of this Territory, or, if so located,
the same has been abandoned or forfeited by reason of the fa
of such former locators to comply in respect thereto with the req
ments of said laws.

JACOB JOHN

Subscribed and sworn to before me this 13th day of July, 7.30 p. m., 1886.

L. F. ROBERTSON,
Deputy Recorder.

391 Filed for record this 13th day of July, 1886, at 7.30 p. m., at request of Jacob Johns, recorded in Book "B" of Quartz Locations, Yreka district, page 229.

L. F. ROBERTSON,
Deputy Recorder.

Recorded at the request of L. F. Robertson, September 8th, 1886, at 5 p. m.

THOMAS McCLELLAND,
County Recorder,
By M. J. SWEENEY, *Deputy.*

That thenceforward and thereafter said locators and their grantees have each and every year performed the work and labor required upon said premises, to the amount of more than one hundred dollars, and that by means of certain mesne conveyances from said locators to these defendants they have succeeded to all the rights and title of said original locators, and that by virtue of the premises above stated, and the doing of all the acts and things required by law to hold and possess this ground claimed by them, they and their predecessors in interest have been the true and lawful owners of said Kirby Fraction Lode claim, and these defendants having, as aforesaid, acquired the title of the original locators, are now the only true and lawful owners in the possession and right of possession of all of said premises.

392 These defendants further allege that the alleged claims of the complainants herein to said Shoshone and said Ibex ground in conflict with said Kirby Fraction Lode claim, are based upon locations made under the following conditions: A large and persistent lode of rock in place passes on its course nearly parallel to the lode or vein which is found in the Kirby Fraction lode, and upon which the same is located, and through those certain mining claims known as the Stemwinder, Last Chance and Tyler mineral claim, the two last named being now patented claims and held by their holders by virtue of conveyance from the United States.

That said Stemwinder mineral claim was located on public unclaimed mineral lands of the United States by one Samuel R. Devine, who was then a citizen of the United States. That he on the 17th day of September, 1885, discovered a lode of mineral-bearing rock in place on said premises, and posted his notice of his claim thereto, containing his name and number of feet claimed by him, the date of location, and a description of the claim; that he marked the boundaries thereof on the surface so that the same could be readily traced by posts and monuments erected to identify the ground claimed; that a substantial copy of said notice, duly verified, was afterwards recorded within thirty days in the office of mining recorder of said district, and subsequently in the office of

the county recorder in and for said county; that ever since s
location was made the said locator and his successors in int
393 est have continuously worked and mined upon the s
Stemwinder mineral claim, and have each year perform
much more than one hundred dollars' worth of labor and impro
ments thereon, and have held, and still hold, the possessory rig
thereto by full compliance with the laws governing such titles.

These defendants further allege that said Stemwinder, L
Chance, and Tyler mineral claims are each traversed by said lar
lode or vein, and the apex is found in each successively as it pas
through from one into the other. A diagram of said claim is a
nexed hereto, marked Exhibit "A," and made part hereof. Th
the dip of said lode is southwesterly from the apex thereof, a
passes from the apex underneath the said Shoshone, Kirby and Ib
claims, and the Helen Marr mineral claim hereafter mentioned,
its dip into the earth, after passing the surface boundaries of each
said Stemwinder, Last Chance, and Tyler mineral claims; that sa
Stemwinder mineral claim was located on the 17 day of Septembe
1885, and said Last Chance on September 21, 1885, and said Tyl
on September 20th, 1885, each and all being prior in date to th
said pretended Shoshone and Ibex locations, under which the plai
tiffs claim. That the said Last Chance claim was located in suc
manner that the said lode crossed both side lines of its surface, an
said side lines became its legal end lines, through which said owne
of said claim should not pass in their workings in following th
394 lode. That the said Stemwinder ground contains the apex
the lode which at depth enters underneath the ground in co
test between the parties plaintiff and defendant, and is prior in da
of location and in right to any of the claims mentioned as containin
the apex of said lode, and its owners are entitled exclusively to a
of the vein in contest between plaintiffs and defendants by virtu
of its prior location as aforesaid.

The defendants further allege that the Last Chance mineral clai
has been worked, and is now worked, through tunnels and ap
proaches entering underground at a long distance from its surfac
ground, and its southerly surface side line, which is its end line i
law, when drawn downwards from the surface vertically, cuts th
aforesaid lode on which it and the said Stemwinder and Tyler ar
located, at a depth of about one thousand feet; that at the tim
when said Miller made said pretended Shoshone location he wa
the agent and engineer in charge of the said Last Chance mining
claim, and the said works were unlawfully at that depth driven int
and upon said Kirby Fraction Lode claim, with full knowledge tha
same was a trespass, and in that way made the pretended discovery
upon the lode whose apex was found only in the claims aforesaid,
and which had been located and held as hereinafter stated by prio
appropriators, and said Miller, well knew at the time that said vei
was not open or subject to location, and that his pretended discov
ery was underneath the surface ground of said Kirby Fraction Lode
claim, also of long prior location.

That said pretended location was intended to defraud the true owners of said premises, and was designed to defeat and cloud their right. That at the time of the pretended conveyance of said Shoshone mineral claim to the plaintiff, the said plaintiff was well informed of all the aforesaid facts, and took said conveyance with full knowledge that said location was made under the circumstances stated, and that the same was wholly invalid, illegal, and void, and could confer upon the grantee named therein no rights whatever.

And the defendants allege that the said F. W. Bradley has succeeded by means of conveyances made heretofore to him of said Stemwinder claim, to be, and now is, the lawful owner thereof, and the owner of the lode thereupon which the said location and discovery of the Shoshone was made, and is entitled to the same.

And for a further defense to this action, these defendants allege that the premises described in the bill of complaint as the Ibex location, save and except the portion in conflict with the Kirby Fraction lode, to wit, all that portion lying east of the Kirby east end line, as described in the diagram of the complainants, and bounded on the north by the Last Chance mineral claim, on the east by the Stemwinder west line, and on the south by the Sold Again mineral claim, was entered up by this defendant Rutter and George A. Sonneman, citizens of the United States, on or about the 27th day of September, 1895, and the said claimants having found a lode of mineral-bearing rock therein in place, located and appro-
396 priated the same as a mining claim, by marking its boundaries as defined in the diagram annexed hereto, so that the same could be readily traced, by posting a notice at the point of discovery, which notice contained a description of the claim, the date of the location and the name of the locators, the name of the claim, and the number of feet claimed on the lode, with a reference to certain fixed monuments sufficient to identify the claim, and after verifying said notice, as required by law had the same duly recorded in the county recorder's office, and by the performance of labor on said claim to the amount of $100.00 in value each year thereafter, and doing all the acts required by law, have continued to hold and possess said premises, and now hold and own the same under the name of the "Helen Marr Lode" claim.

That the said vein upon which the said Stemwinder is located as aforesaid also enters on its dip from its apex therein underneath the said Ibex surface ground, and is the same vein and none other on which the pretended Ibex location was made, and said surface ground described as such was located long after the "Helen Marr" aforesaid, and was and is invalid, and void for any purpose.

Wherefore, these defendants having fully answered, confessed, traversed, and avoided or denied all the matters in said bill of complaint, material to be answered unto according to their best knowledge and belief, humbly pray this court to enter its judgment and decree that the said complainants are without any possession,
397 or the right of possession of, in, or to said premises, or any part thereof, and for such other and further relief in the prem-

ises as to the court may seem meet and in accordance with equity, and for their costs in this behalf expended.

JOHN R. McBRIDE,
Counsel for Defendants.
JOHN R. McBRIDE,
Solicitor for Defendants.

STATE OF IDAHO, } ss:
County of Shoshone, }

Royal J. Rutter and Frederick W. Bradley, being each duly sworn, according to law, deposes each for himself, as follows:

I am the defendant named in this action, and I state that so much of the foregoing answer as states the acts and deeds of the defendants are true to the best of my knowledge and belief, and so much thereof as states the acts and deeds of other persons I believe to be true as stated.

R. J. RUTTER.

STATE OF IDAHO, } ss:
County of Shoshone, }

Subscribed and sworn to before me this 30th day of March, 1897.
[SEAL.] TONY A. TUBBS,
Notary Public.

(Here follows diagram marked p. 397*a*.)

398 (Endorsed:) No. 102. Original. In the United States circuit court, district of Idaho, northern division. The Shoshone Mining Company, complainants, *v.* Royal J. Rutter and Frederick W. Bradley, defendants. Answer of defendants. Copy received April 8th, 1897. W. B. Heyburn, counsel for plaintiff. Filed April 9th, 1897. A. L. Richardson, clerk, by F. H. Grierson, deputy.

In the Circuit Court of the United States in and for the Northern Division of the District of Idaho.

THE SHOSHONE MINING COMPANY, Complainant,
vs.
ROYAL J. RUTTER and F. W. BRADLEY, Defendants. } In Equity.

Replication.

This replicant, The Shoshone Mining Company, saving and reserving to itself all and all manner of advantage of exception which may be had or taken to the manifold errors, uncertainties, and insufficiencies of the answer of the said defendants, for replication thereunto saith that it doth and will aver, maintain, and
399 prove its said bill to be true, certain, and sufficient in law to be answered unto by the said defendants and that the answer of the said defendants is very uncertain, evasive, and insufficient in

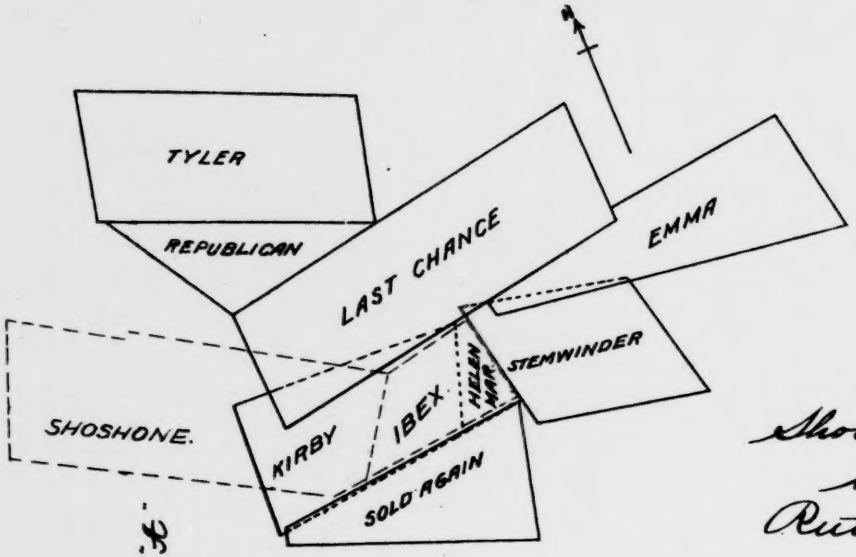
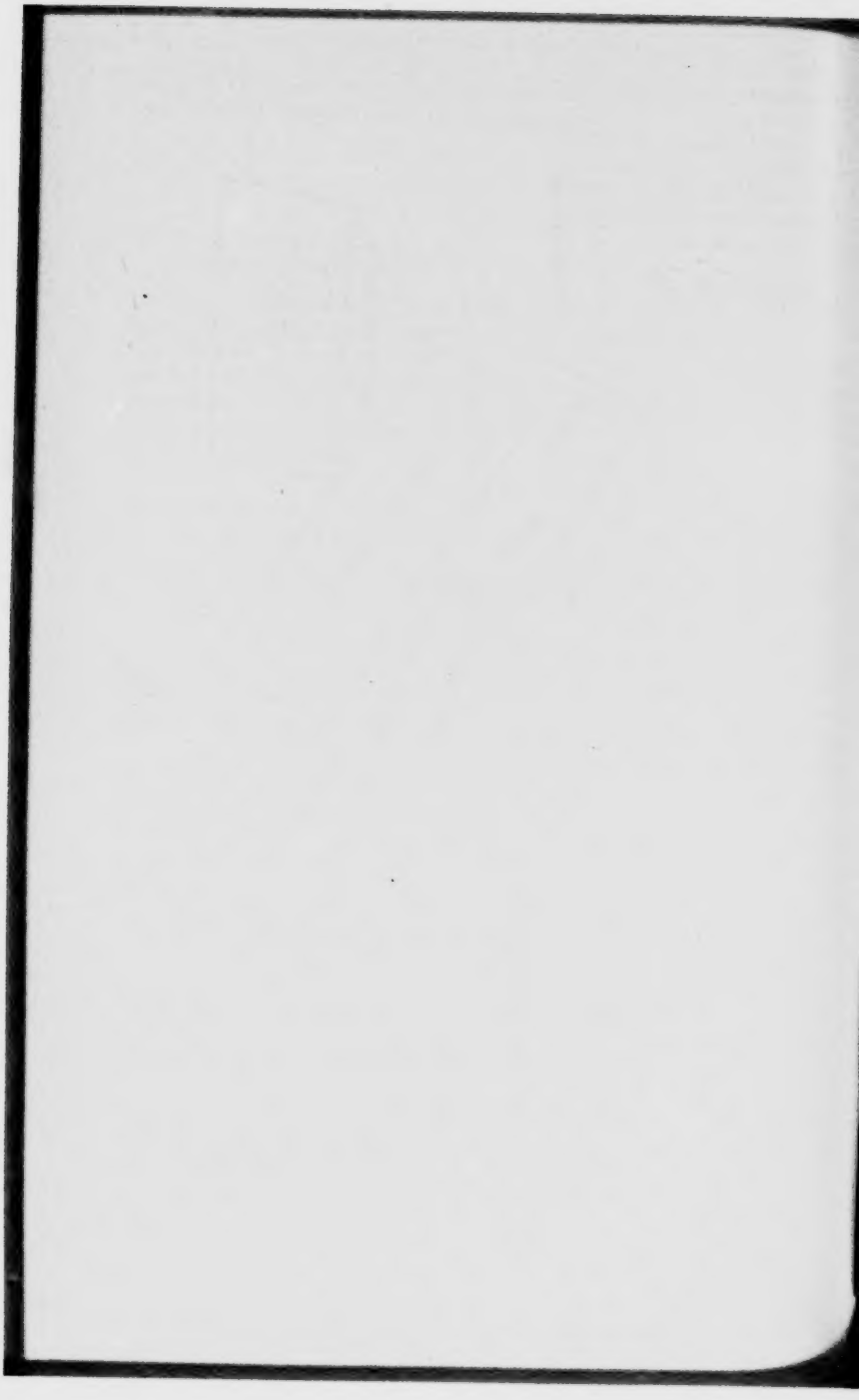


Exhibit "E"

No. 208
Shoshone Co.
v.
Rutter et al.
} p. 397a



law to be re-lied unto by said replicant, without this, that any other matter or thing in said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed or denied, is true; all of which matters and things this replicant is ready to aver, maintain and prove, as this honorable court shall direct, and humbly prays as in and by his said bill he hath already prayed.

W. B. HEYBURN,
Solicitor for Plaintiff.

(Endorsed:) No. 102. In the U. S. circuit court, ninth judicial district, in and for the district of Idaho, northern division. The Shoshone Mining Company, complainant, *v.* Royal J. Rutter and F. W. Bradley, def'ts. Replication. Service of copy of this replication received this 17th day of April, 1897. John R. McBride, attorney for defendants. W. B. Heyburn, solicitor for complainant. Filed April 19th, 1897. A. L. Richardson, clerk, by F. H. Grierson, deputy.

400 In the Circuit Court of the United States in and for the District of Idaho, Northern Division. In Equity.

THE SHOSHONE MINING COMPANY, a Corporation, Complainant,
vs.
ROYAL J. RUTTER and F. W. BRADLEY, Defendants.

Stipulation.

It is hereby stipulated, as in open court, by and between the parties hereto, that either party may have until July 15th, 1897, to prepare and present for settlement bill of exceptions upon any and all points of exception taken at the trial of the above-entitled action.

JOHN R. McBRIDE,
Solicitor for Complainants.
W. B. HEYBURN,
Solicitor for Defendants.

401 (Endorsed:) No. 102. In the U. S. circuit court, northern division, district of Idaho. Shoshone Mining Company *v.* Royal J. Rutter *et al.* Stipulation. Filed July 5th, 1897. A. L. Richardson, clerk.

In the Circuit Court of the United States, Northern Division, of the District of Idaho.

SHOSHONE MINING COMPANY, Plaintiff,
vs.
ROYAL J. RUTTER and F. W. BRADLEY, Defendants.

Opinion.

W. B. Heyburn, attorney for plaintiff, and John R. McBride and Chas. W. Beale, attorneys for defendants.

The facts and the law applicable to this case being so similar to those in the case of Royal J. Rutter *et al. v.* The Shoshone Mining Company, just decided, it is deemed unnecessary to review
402 either here, but making the decision in that case the basis for the action in this, judgment herein is rendered in favor of the defendants.

BEATTY, *Judge.*

(Endorsed:) No. 102. In the U. S. circuit court, northern division, district of Idaho. Shoshone Mining Company *v.* Royal J. Rutter and F. W. Bradley. Opinion. Filed June 25th, 1897. A. L. Richardson, clerk.

In the Circuit Court of the United States, District of Idaho, Northern Division, May Term, 1897.

THE SHOSHONE MINING COMPANY, Complainant,
vs.
ROYAL J. RUTTER and F. W. BRADLEY, Defendants.

Decree.

This cause came on for hearing at this May term of the court, and proofs having been taken and heard by the court, and the cause argued by the counsel for the respective parties, was submitted and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows:

403 That the defendants, Royal J. Rutter and Frederick W. Bradley, are by virtue of the location of that certain piece or parcel of mining ground described in the complaint as the Kirby Fraction Lode mining claim, the same having been located, held, worked, and possessed by the said defendants' grantors and by said defendants since the 11th day of July, 1886, and said defendants having applied for patent for the same to the United States Land Department, which application being contested by the complainants therein, and by this action brought in pursuance thereto, are the true and lawful owners, and entitled to the possession and right of possession thereof as against the said complainants and all other claimants. And it is further ordered, adjudged, and decreed that the claim of the complainants to the said premises, under and by

virtue of its location thereon as the Ibex Lode and mining claim, is without right and invalid, and confers no right or title to said premises, or any part thereof, and said claim, as against said complainants, is hereby adjudged and decreed to be wholly illegal and void.

It is further adjudged and decreed that the defendants herein are entitled to a patent to the said premises from the United States, and that their rights to the possession thereof be quieted as against all and any claim of the complainants thereto or otherwise.

And whereas it has appeared upon the trial of this action that the plaintiff has entered into and upon said premises described in its complaint, as in conflict with the claims of said defendants
404 under the location called the Kirby, and asserts its actual possession of said premises: It is hereby further ordered, adjudged, and decreed that the said complainant, The Shoshone Mining Company, be, and it is, and all its agents, workmen, servants, employees, and any and all other persons acting by or under its permission or authority, and each of them, is hereby enjoined and forbidden perpetually from entering into or upon said Kirby Lode claim, and from extracting any ores therefrom, or working therein or committing any trespass or waste upon or in the premises adjudged to the defendants.

It is further ordered, adjudged, and decreed that the defendants herein do have and recover of and from the said plaintiff their costs taxed at $—, and that execution issue therefor.

Dated August 30th, 1897.

JAS. H. BEATTY, *Judge.*

While no injunction was asked by the pleadings, it has been since the announcement of my conclusion, and the matter has been argued by counsel for each party; it is therefore ordered as above.

BEATTY, *J.*

(Endorsed:) No. 102. In the U. S. circuit court, northern division, district of Idaho. Shoshone Mining Company *v.* Royal J. Rutter and F. W. Bradley. Decree. Filed Aug. 30, 1897. A. L. Richardson, clerk.

405 In the Circuit Court of the United States in and for the District of Idaho, Northern Division.

THE SHOSHONE MINING COMPANY, a Corporation, Complainant,
vs.
ROYAL J. RUTTER and F. W. BRADLEY, Defendants.

Motion for Rehearing.

The complainant in the above-entitled cause now moves the court for a rehearing therein on the following grounds:

I.

That the evidence shows that there was no discovery made upon the "Kirby" location prior to the making of said location, and that

it is essential that this should appear affirmatively in the findings of the court and in the record.

II.

That the testimony shows that the southwest corner stake
406 of the "Kirby" was drawn in officially, and that from the time of the drawing in of said corner stake the "Kirby" owners made no claim to the ground lying beyond that boundary so established, which facts should appear in the record and in the findings of the court.

III.

Because the testimony shows that the "Edith" location was perfected prior to the location of the "Kirby," and covered the same ground, which facts should distinctly appear in the findings of the court and in the record.

IV.

Because the record shows that the complainant's claim was based upon a discovery of mineral-bearing rock in place deep under the surface, which facts should distinctly appear in the findings of fact by the court and in the record.

V.

Because the testimony shows that the Shoshone mining claim was located upon vacant and unoccupied public mineral lands of the United States.

VI.

Because the testimony shows that the ledge as claimed by
407 the Shoshone Mining Company does not belong to any other person, and is the property of the Shoshone Mining Company.

VII.

Because the testimony shows that the Shoshone Mining Company is entitled to a patent for the ground in controversy.

VIII.

That any judgment, decree, or finding made by the court in the premises should be accompanied by the testimony or a statement of the testimony adduced before the court at the trial.

W. B. HEYBURN,
Counsel for Complainant.

(Endorsed:) No. 102. In the United States circuit court, ninth judicial circuit, in and for the district of Idaho, northern division. The Shoshone Mining Company *v.* Rutter and Bradley. Motion for a rehearing. Filed July 10th, 1897. A. L. Richardson, clerk. W. B. Heyburn, counsel for complainant.

408 In the Circuit Court of the United States in and for the District of Idaho, Northern Division.

THE SHOSHONE MINING COMPANY, Plaintiff,
vs.
ROYAL J. RUTTER and F. W. BRADLEY, Defendants.

Transcript of Testimony.

Be it remembered, that on this the 25th day of May, A. D. 1897, in the circuit court of the United States, district of Idaho, northern division, this cause came on duly to be heard, before Honorable James H. Beatty, judge thereof, without a jury; the plaintiff appearing by its counsel, W. B. Heyburn, Esq., and the defendants appearing by their counsel, John R. McBride, Esq., and C. W. Beale, Esq., whereupon the following proceedings were had, to wit:

Mr. HEYBURN: Let the record show, I suggest to the court, let the record show that we have finished the testimony on both sides in the case of Rutter and Bradley, against The Shoshone
409 Mining Company; that the case is ready for argument, and that the court orders that we proceed to introduce testimony in the case of The Shoshone Mining Company against Rutter and Bradley, involving a controversy between the Ibex and Shoshone claims, upon an adverse filed against the application of the Kirby for a patent. The plaintiff protests against proceeding at this time, for the reason that there is a case pending before the court involving different title that has not been disposed of. We ask the court to rule on that.

The COURT: I will overrule the objection, and we will go on with the case.

Mr. HEYBURN: Your honor will give us an exception?

The COURT: Yes.

Mr. HEYBURN: I have introduced a certified copy of the Shoshone notice, which I will ask leave to introduce in this case.

(Thereupon the document just offered was admitted in evidence, and marked Plaintiff's Exhibit "A." For copy of said exhibit, see page 312 of this record.)

Mr. HEYBURN: I introduce the original location of the Ibex, and ask leave to substitute a certified copy for it at any time.

Mr. MCBRIDE: All right.

(Thereupon the document just offered was admitted in evidence and marked Plaintiff's Exhibit "B." A copy of said exhibit is to be found beginning on page 275 of this record, and is made a part hereof.)

410 W. C. MILLER, being first called and duly sworn on behal of the plaintiff, testified as follows:

Direct examination.

By Mr. HEYBURN:

Q. Mr. Miller, state if you are acquainted with the discovery point of the Ibex mining claim.

A. I am.

Q. Just describe it?

A. Well, it is in a drift off from the end of a stope in ore.

Q. Well, describe what is in that drift at the discovery point in the way of mineral-bearing rock in place?

A. There is six or eight feet of concentrating ore.

Q. What kind of ore?

A. Galena.

Q. Carrying what?

A. Silver and lead.

Q. State if you did the acts of location of this claim, what you did.

A. I posted a notice vertically above this discovery point on the surface, and attached a notice to a post or tree, I have forgotten now which it is, about 25 feet west of the east end line of the claim.

Q. East of?

A. East of the west end line of the claim.

Q. Will you look at this notice (and I show witness Plaintiff's Exhibit "B") and state whether or not the notice you posted was substantially a copy of that?

A. Yes, sir.

411 Q. This, you say, is substantially a copy of the notice posted on the ground?

A. It is.

Mr. HEYBURN: Of course counsel understands in offering this notice I offer the certificate of record on it?

Mr. MCBRIDE: Certainly.

Q. After you had posted this notice above the discovery point, what did you do with reference to marking the boundaries of the claim?

A. I put up three stakes on the east end, on the west end first, the southwest corner, the west center end, and the northwest corner.

Q. Describe those corners—what did you put there to mark the claim?

A. I put stakes about five inches square, and about five feet high; planted them properly and marked them with the name of the claim and the name of the corner.

Q. What other stakes did you place around the——

A. I put up three stakes on the east end of the claim, the east center end stake, the southeast corner, and the northeast corner, marking them and planting them as stated before, with the name of the claim and the corner.

Q. What were the size of those stakes?
A. About five inches square and about five feet high.
Q. When did you do this?
A. It was the middle of August, 1896, about the middle of August; 14th I think.

412 Cross-examination.

By Mr. McBRIDE:

Q. About the middle of August, 1896. Were you aware at that time that the Kirby location covered that ground?

Mr. HEYBURN: Object to that as immaterial.
(Overruled. Exception.)

Q. Were you aware at that time that the location of the Kirby at that time covered that ground called the "Ibex"?
A. I was aware that they claimed it.
Q. They had their stakes there on the ground?
A. Yes, I knew they had some stakes on the ground.
Q. You put it on there with full knowledge of the fact that the Kirby was claiming that ground?
A. Well, I knew they claimed it, yes.
Q. About what distance from the surface where you posted your notice, and you have not calculated so as to know positively, about what distance from that point which you call discovery at the surface where you put your notice of discovery is it, down to the point where you say you found ore?
A. Well, I estimated that as near as I could, it is between 800 and a thousand feet vertically beneath it, I should think, beneath the location notice.
Q. What is the character of the vein upon which you made that location; is it a large vein or a small one?
A. It is a good-sized vein.
413 Q. Well, what do you mean by good sized?
A. Quite a wide vein.
Q. Two feet?
A. Yes; it is wider than two feet, or as wide.
Q. Isn't it wider than that?
A. Yes, sir.
Q. How much wider; what is your estimate of the width of the vein upon which you made that location?
A. I made the location in some workings.
Q. I did not ask you about the workings; what is your estimate of the width; what do you know about it?
A. Well, I decline to state the width of the vein.
Q. I do not ask you to state the width, I ask you for an estimate. You have been working in that ground for a good many years?
A. Yes, sir.
Q. Well, you know how wide?
A. It is fully 20 feet wide there.

Q. At that point?
A. Yes, sir.
Q. Would you limit it to that, as the width of the vein upon which you made that location; thickness of it?
A. I do not know as I would.
Q. Ain't that vein a hundred feet wide, in your judgment?
A. Well, I expect it is; yes, sir.
Q. Is that the same vein upon which the Last Chance is located?

Mr. HEYBURN: I object as immaterial.

Q. Do you know where the location is of the Last Chance?

The COURT: I do not think it is cross-examination.
(Overruled.)

414 Mr. HEYBURN: In order to save controversy in this case, I will say that the vein upon which we located, is the vein that dips down through the Last Chance, has its apex in the Last Chance claim, and that it is the vein after it leaves the south side line of the Last Chance. I will admit that proposition fairly and squarely; that it apexes in the Last Chance claim, and let the record show it.

Q. How did you find this ore? How did you find this ore?
A. Well, Judge, I did not find it.
Q. How did you make this discovery?
A. I did not make the discovery, I did not locate the claim; I located as agent for the company.
Q. How is that?
A. I did not locate the claim: I located merely as agent of the company?
Q. You did it?
A. Yes, sir.
Q. Though you are the man who did it. I want you to state whereabouts you found this ore, where you made the location point and whereabouts it was.
A. As I stated before, it is in a drift off from the end of a stope.
Q. From what works?

Mr. HEYBURN: Object to that as immaterial what works it is from. It is not material how he found it.

The COURT: It is already admitted that it is on the ledge that passes through the Last Chance.

Mr. MCBRIDE: He had to get there some way. I want to know how he got there.

415 Mr. HEYBURN: That apexes in the Last Chance. I will stipulate he went in the Sweeny tunnel, through the Last Chance claim.

Mr. MCBRIDE: And to this point through works driven from there.

Q. Is that same vein, Mr. Miller, you are well acquainted with the claims in that vicinity there, is that same vein——

(Question withdrawn.)
Witness excused.

Mr. HEYBURN: Now, if the court please, I offer in evidence a certified copy of the adverse proceedings in the land office. In this case I call counsel's attention to that fact, the deed from Mr. Miller to the Shoshone Mining Company for the Shoshone mining claim, was offered in evidence in the other case. It is not denied in this case. If there is any question about the sufficiency of the admission I will withdraw the deed from the other case.

The COURT: It may be understood that the deed is in evidence from Miller to the Shoshone Mining Company.

(Now, at this time the paper last offered is designated as Plaintiff's Exhibit "C" in this case. For copy of said exhibit see page 299 of this record.)

Mr. HEYBURN: Now, we will stipulate that the testimony for both sides as to the Kirby location in the other case shall be the testimony in this or have you additional testimony to offer?

416 Mr. MCBRIDE: I am perfectly willing that the testimony on both sides, so far as the Kirby location—conflict between the Kirby and Shoshone—is concerned may be considered as evidence in this case to the extent that may be applicable.

Mr. HEYBURN: Well, we will let that stipulation appear in the record.

Mr. MCBRIDE: On both sides?

Mr. HEYBURN: On both sides, our testimony and yours. In other words, the same identical testimony, and the exhibits and everything pertaining to it. We rest.

Mr. MCBRIDE: If your honor please, I now make a motion to dismiss this bill upon this ground; that it appears from all the testimony in the case that the defendant, The Kirby Mining Company, have been is possession of this ground for more than the time of the statute of limitations; that the work had been done by them before there ever was any attempt upon their part to locate the ground in 1896, and it was admitted to be located upon ground that was known by the locators at that time to be covered by their location, on the stand. That being so, we are entitled to it upon two grounds; that is, actual, continued adverse possession. If it was not mining ground we would be entitled to a nonsuit from any such suit as this.

The COURT: You are relying upon the question of possession, and if it is based alone upon the statute of the State, the

417 statute of the State would subvert the letter of the statute of the United States, which makes certain provisions as to how mining claims shall be located and how they shall be forfeited. I should have to overrule the motion.

(Exception.)

Mr. MCBRIDE: In order to make our proofs all orderly, I submit we transfer to this case all our proofs in regard to location and assessment-work, and all the facts which are in the other case, which go to establish our claim to the ground in dispute.

The COURT: I understand there was a stipulation already.

Mr. MCBRIDE: Yes, in pursuance of that stipulation.

The COURT: The stipulation includes all the testimony.

Mr. McBRIDE: Let it be stated in pursuance of the stipulation that it is all considered that is applicable.

F. W. BRADLEY, being first called and duly sworn on behalf of the defendants, testified as follows:

Direct examination.

By Mr. McBRIDE:

Q. Mr. Bradley, you are a mining man, I believe?

A. Yes, sir.

Q. How long have you been in the Wardner district, Yreka Mining district?

A. About six years and a half.

418 Q. Are you familiar with the locations on what is generally popularly known in the country there as the Bunker Hill vein or lode running through the country there?

A. Yes, I am thoroughly familiar with them.

Q. How have you acquired that familiarity?

A. By going over the ground a great many times—by actual surveys, measurements, inspection.

Q. Have you been on the course of that lode to the northeast of the Bunker Hill, including those claims that lie over there on over towards the Tyler?

A. Yes, I have been all over that ground.

Q. I will ask you to state whether these claims have a vein penetrating them, passing through them?

Mr. HEYBURN: Object to that as immaterial.

A. Yes.

Mr. HEYBURN: There is a stipulation in the record here, which was accepted by both sides, that this discovery was made upon a continuation of that vein after it passed the south side line of the Last Chance claim. It is not necessary or material after that to go into a long investigation of that question to determine whether that stipulation is true or not.

The COURT: I do not know as I recall the stipulation. I
419 understand it was made on the ledge which apexed in the Last Chance, and also there was something added upon the ledge after it left the side line.

Mr. HEYBURN: That it dips out of the side line.

The COURT: How far you would allow it to extend in a southeasterly direction from the Last Chance I do not think the stipulation covers. If there was a stipulation here that the ledge which runs across the country there easterly from this Ibex, is it, location?

Mr. HEYBURN: Yes.

The COURT: If there were a stipulation of that kind, I think it would exclude all this other testimony. I do not know whether your stipulation goes that far.

Mr. HEYBURN: I do not catch the exact point.

The COURT: I meant far enough in a southeasterly direction from the Last Chance mine to clearly cover the ground within the two side lines of the Ibex.

Mr. HEYBURN: Yes, it is the same ledge; that is the stipulation; it is the same ledge.

The COURT: It crosses through from the Last Chance into the Stemwinder, across the Emma there?

Mr. HEYBURN: It trends through there.

Mr. McBRIDE: Unless the counsel admits the same ledge passes through, the same vein——

Mr. HEYBURN: I admit it passes through there on its strike.

Q. What is its dip—that is admitted; what is the dip of that ledge as it passed through the Last Chance and Stemwinder?

A. The average dip from the Stemwinder——

420 Mr. HEYBURN: Object to that; the question is as to the dip of that ledge as a ledge.

A. Well, in that country——

Mr. HEYBURN: Hold on, Mr. Bradley! I object to the testimony, not proper; especially from the Stemwinder. It is an immaterial issue interjected into this case; cannot affect the rights of these parties in recovering. We stipulated that this is the same ledge that passes on its strike or trend through those various claims.

The COURT: Which claims?

Mr. HEYBURN: All of them.

The COURT: Last Chance?

Mr. HEYBURN: Yes, Last Chance, Bunker Hill, Stemwinder, Tyler, and Emma.

The COURT: That is location upon the same ledge?

Mr. HEYBURN: On the same ledge.

Mr. McBRIDE: Do you admit——

The COURT: It strikes me that covers the whole question.

Mr. HEYBURN: Now, the rest of that is a legal proposition; that is my intention, sift it right down. The rest of it is a question of lines.

The COURT: Question of lines as to the rights of those claims.

Mr. HEYBURN: We don't need to ask the opinion of any witness on that.

The COURT: I do not see why it does not cover it, Judge McBride.

421 Mr. McBRIDE: If he concedes that the apex was there in the direction we claim it is. He won't admit what the dip is.

The COURT: It is immaterial if it is upon the same ledge; the apex is in these claims.

Mr. McBRIDE: It might dip away from them.

The COURT: It could not be located upon that ledge if it dips the other way. He admits their claim is located upon that ledge.

Q. Where is the apex of that ledge that passed through those claims?

Mr. HEYBURN: Object to that as immaterial; that is, I take it is directed to this Stemwinder, the allegation in reference to the Stemwinder in the answer, and upon that supposition, and I presume I am right, I desire to interpose the objection that the Stemwinder as they themselves bring it into court—that the Stemwinder as they themselves bring it into court is not interested there. I object to the testimony as immaterial so far as the Stemwinder is concerned, because it ain't interested in it any more than it is interested in a body of ore lying over here or on the other side. It can have no title to it—don't make any difference.

Mr. MCBRIDE: What I want to do by these questions is to get at the facts. I do not know what opinion the court may hold as to the law; that is something we do not know, I am trying to get at the facts.

The COURT: I have made up my mind to let you ask that question as to where the apex is. Overrule the objection.

422 Mr. HEYBURN: Your honor does that upon the theory suggested by your honor? (Referring to suggestion made by the court to Mr. Heyburn during Mr. Heyburn's argument, which argument the reporter was not requested to take.)

The COURT: I have my own ideas, I do not know what use you can make of it afterwards. I am doing it upon the theory that I have already suggested.

Mr. HEYBURN: That is what I supposed. I will save my exception.

The COURT: I have not made up my mind. I simply suggested to you what my idea is. I may be wrong. Exception is saved.

A. May I point it out on the map?

Q. You may point it out if there is any mark there by which you may indicate it.

A. Why, the foot wall of the vein is indicated by these flags (referring to map).

The COURT: The foot wall?

A. The foot wall of the vein where it reaches the surface, at each one of these places where flags were standing, the foot wall of the vein can be distinctly seen.

Q. Well, go right on up with it.

A. And the apex can be followed from flag to flag, across the Bunker Hill, across the Stemwinder, across the Emma, across the Last Chance into the Tyler.

Q. Now, what is the dip of that vein? Have you been through these works to see what the general dip of it is, the direction of the dip?

423 Mr. HEYBURN: Object to that as immaterial.
(Overruled.)

Q. The direction of the dip?

A. The general direction of the dip is to the southwest.

Q. Have you been through those works yourself, personally, underground there to know where that vein is?

A. I have been a great many times through the Bunker Hill and Stemwinder, and a number of times through the Last Chance works.

Q. Are there any works in this ground underneath, represented by the Helen Marr location, underneath the surface?

Mr. HEYBURN: Object to that as immaterial; Helen Marr has no place in this case. I would like to submit a proposition to the court whether or not it is proper or allowable, under the circumstances, two people here adversing each other; that is, one applying for a patent and the other is adverse, it is not competent to litigate a claim that does not touch the ground in controversy in this suit.

The COURT: Not to controvert the title of any other claim, and I don't consider we are controverting the title of these claims you have referred to—the Bunker Hill, the Stemwinder, and the Last Chance. The only object—the only idea—I had in view in permitting that testimony is to discover whether or not your location is based upon a previously discovered ledge.

424 Mr. MCBRIDE: The object of this is to show that we own this ground and they do not.

The COURT: I will sustain the objection to that, if that is the object.

(Defendants except.)

Q. Mr. Bradley, I will ask you to state whether the apex of that vein is in the Stemwinder—I mean of that big vein that you refer to.

The COURT: Hasn't he said the apex is right along that line?

Mr. HEYBURN: Yes, he did.

A. I said it passed through the Stemwinder from the Bunker Hill into the Emma.

The COURT: Yes, that is what he said.

Mr. HEYBURN: Are those flags numbered, Mr. Bradley? It would be well in the record to give the number of the flags.

The COURT: Just number those flags that you say are on the apex of the ledge.

A. No. 2, No. 3, No. 4, No. 5, No. 6——

The COURT: There are two there in the Emma?

A. Different portions of the vein. No. 6 is on the foot wall; No. 8, No. 9.

Q. Are they numbered on there?

A. Yes, sir; they are numbered on the map.

The COURT: No. 6 is on the Emma ground. Now, then, what is the next one above there on the Tyler ground?

A. No. 8, No. 9.

425 The COURT: What is the one beyond there?

A. I have not been to that one; I do not know.

The COURT: I thought you left out No. 7.

Mr. HEYBURN: He has no flags on the Last Chance; he jumps that.

Q. Does that map show any scale?

A. No, it does not.

Q. Do you know the scale that it is made on?
A. Fifty feet to the inch.

Witness excused.

Mr. McBRIDE: That map we desire to put in evidence also as in this case as our exhibit. "1" it will be.

(Now, at this time the map just referred to was admitted in evidence and marked Defendants' Exhibit "I.")

Mr. HEYBURN: There is a lode line that I want on that map.
Mr. McBRIDE: Miller and Porter can do that.
Mr. HEYBURN: We can do that out of court?
Mr. McBRIDE: Yes.
Mr. HEYBURN: I want the course of the lode on a horizontal plane, such as was given in that trial, and then that map will be all right for an exhibit.
Mr. HEYBURN: I have here now a transcript containing the judgment in the Stemwinder case, showing the date of the location and all the facts about it, and the fact that ground is given to the Emma, I will then introduce. You admit that?
Mr. McBRIDE: No, sir.
The COURT: Well, he can introduce it.
426 The COURT: What about this ownership of the Stemwinder?
Mr. McBRIDE: Here is the notice of location. The muniments of title I understand are all here. We want to begin at the beginning. We don't want to introduce part of these until we get more definite.
Mr. HEYBURN: Judge, let's just look at this judgment and see whether or not it don't settle some of those questions fully.
The COURT: I do not know as I am going to try the title to the Stemwinder in this.
Mr. McBRIDE: It is simply to show that we are the owners of the Stemwinder, if my friend will admit that, we are all right.
Mr. HEYBURN: It will depend something on that date that you claim.
Mr. McBRIDE: Well, we claim by the original location.
Mr. HEYBURN: That has been adjudicated in a two-handed fight.
The COURT: That has been adjudicated and a different date settled?
Mr. McBRIDE: Not between these parties.
The COURT: It strikes me the only question is whether the Stemwinder was located before this Ibex.
Mr. HEYBURN: There is no question about the Stemwinder being older than the Ibex.
The COURT: About settling the Stemwinder here, I do not see. How about that?
427 Mr. HEYBURN: They allege a fictitious date of the Stemwinder; I do not want any judgment of this court upon that on the ground there is no testimony on that.
The COURT: Introduce their notice and then you can introduce

the record there to show that a different date has been adjudicated, and the proof can be considered if that becomes important.

Mr. McBRIDE: We insist that the Stemwinder is the oldest location among these locations lying west there. Do you mean that adjudicates that the Stemwinder cannot be shown prior to some location there?

Mr. HEYBURN: I mean that the Stemwinder cannot be shown to be prior to the record.

The COURT: You can introduce your record and we will determine that record afterwards.

Mr. HEYBURN: If you will introduce your notice of location I will introduce this record, and we will waive the question of proving your location of the Stemwinder further than that.

Mr. McBRIDE: About the amended location. I propose to prove that the Stemwinder is the oldest of all the locations; so alleged in the answer and I desire to prove it.

Mr. HEYBURN: I refuse to further plead.

Mr. McBRIDE: In order to show it was located, we will have to show the date.

Mr. HEYBURN: If the court please, how is it material about the date?

428 Mr. McBRIDE: It turned out to be very material in the Tyler case. I want to have it correct in this one.

The COURT: The materiality of it is, in my view of the law, to show that there was a ledge located there; that this ledge upon which the Ibex was located was previously located.

Mr. HEYBURN: That the apex of that ledge was previously located?

The COURT: Yes.

Mr. HEYBURN: That is admitted.

The COURT: I know it is admitted; so far as my view of the law that is all that is necessary. I am willing, to indulge counsel, to admit that. There may be some question raised of which I do not see the pertinency now.

Mr. HEYBURN: He wants to get the date of the location of the Stemwinder.

The COURT: I do not think that is an important question.

Mr. McBRIDE: You regard that as only material to determine it was prior?

The COURT: Yes, seems to me so.

Mr. McBRIDE: Then I will offer in evidence simply the location notice and the amended location notice of the Stemwinder.

Mr. HEYBURN: I object to them as immaterial; no issue in this case on which that testimony can be material.

The COURT: Well, I will overrule the objection and consider them. (Exception.)

429 (Thereupon the two documents just offered were admitted in evidence and marked, respectively, Defendants' Exhibit 2 and 3. Copies of said exhibits are to be found beginning on pages 82 and 85 of this record, and are made a part hereof.)

Mr. McBRIDE: I think we are through.

Mr. HEYBURN: It is stipulated that the lines showing the true course of the ledge on map Exhibit "A," used in the case of Tyler Mining Company against Sweeney *et al.* shall be placed upon the map Defendants' Exhibit 1, as indicating the line that would be fixed by the respective engineers, should they testify in this case, as to the true course of the ledge passing through the grounds in controversy.

Mr. HEYBURN: Now, the court admitted in evidence—are you through with your side?

Mr. McBRIDE: No, sir.

Mr. HEYBURN: When you are I want to introduce some papers.

Mr. McBRIDE: Can't we enter a stipulation for the purpose of this case, the allegation in the answer that Mr. Bradley is the owner of the Stemwinder, and for no other purpose, is admitted to be true?

Mr. HEYBURN: Yes, the stipulation is for the purpose of this case and for no other purpose, and to be used in no other case; it is admitted that Mr. Bradley is the owner of the Stemwinder mining claim. This admission is not to bind any party to this action in any other case.

430 The COURT: Have you anything further to offer?

Mr. McBRIDE: I think not. I will see. My client is objecting to the stipulation I made. If he objects to it I will have to withdraw it. Will have to introduce proof on that subject.

The COURT: I doubt if you can change the result if you introduce proof.

Mr. McBRIDE: My client says he cannot agree to stipulate as to the general course of the vein, so I withdraw my stipulation.

Mr. HEYBURN: Read just over those lines and have them put on that map, and we will argue the effect of it to the court, as the testimony of Mr. Loring, Mr. Porter, and Mr. Miller, as to the course of that ledge; the court can make an order to do it.

Mr. McBRIDE: That is not testimony in this case unless we consent to it.

The COURT: He can offer that as testimony and you can object to it.

Mr. McBRIDE: No, sir; the witnesses are here and they can be produced, and produce the testimony. I think from what I have learned some of them have a different opinion than that.

The COURT: You offer those lines, do you, as testimony? Counsel objects to the offer. I will overrule the objection and allow you to introduce them.

Mr. McBRIDE: I take an exception.

Mr. HEYBURN: I will have Mr. Miller put a line on that other map.

431 Mr. McBRIDE: The stipulation we entered into of course is vacated.

Mr. HEYBURN: It is understood the court will allow Mr Miller to put it on the map according to those lines?

The COURT: He had better do it in the presence of one of the others.

Mr. McBRIDE: In that view of the case I will call Mr. Bradley to testify on that subject.

The COURT: Very well.

Mr. McBRIDE: The general course of that lode.

F. W. BRADLEY, recalled on behalf of the defendants, testified as follows:

Direct examination.

By Mr. McBRIDE:

Q. Mr. Bradley you have testified that you were acquainted with the strike of that lode, with its location through those different claims. Will you testify in regard to the general course and strike of that lode through the country there, through those different claims on which the flags are established?

A. I can; yes, sir, by reference to objects on the map; not by course.

Q. Very well, if you can refer to any objects on the map you may do it for the purpose of indicating what the course is.

A. (Witness referring to Exhibit "I.") In the Last Chance
432 workings on the—at the level of the Sweeney tunnel, the foot wall of the vein is at a point slightly ahead of the main Sweeney tunnel. The point is indicated——

The COURT: One moment! Can't you figure out the general course of that ledge through the country, without going through all this detail? In the first place, I do not regard it as a very important matter; at any rate, going into all this detail, examining every point will consume an immence amount of time. Can't you figure it out—can't you give the course by objects on the map?

A. I could with tools. I was just going to mention two points.

The COURT: Don't mention more than two, don't go into details. I thought you were undertaking to select all along there different points.

A. This point that is immediately west of the main Sweeney tunnel is here on the—rather, it is indicated on the other map introduced previously. Another point on the foot wall of the vein at a corresponding level is immediately under this discovery, the discovery of the Sold Again.

Q. Yes, drawing a line between those points, would drawing a line between those points indicate what you would regard as the general course of that lode?

A. It would be the general course of the lode through this particular country, right in this portion of the vein.

Q. Now, put those two points on the map so they can be marked.

Mr. HEYBURN: Make them with a ruler.

433 A. Yes, got a ruler here somewhere, scale?

(Witness gets a long stick and makes a mark on the map referred to.)

Q. Now, just mark that course of lode, with your own name.

Mr. McBRIDE: Take the witness.

Mr. HEYBURN: I have no questions to ask Mr. Bradley.

Witness excused.

Mr. HEYBURN: Now, I ask the court to rule out everything about the date of the Stemwinder; that is to say, no judgment in this case will undertake to fix the date of the Stemwinder.

The COURT: No, but I have allowed them to introduce their notice, and now allow you to introduce your record, but I make no ruling as to what the effect of it will be. I make no ruling as to the effect of it.

Mr. McBRIDE: Object to that record as incompetent, irrelevant, and immaterial. A record made between different parties and not binding the Stemwinder mine or the present Stemwinder owners.

The COURT: I will overrule the objection and let it be admitted.

Mr. HEYBURN: I offer in evidence from the record in the Supreme Court of the United States, case No. 62, October term, 1890, Stemwinder Mining Company, plaintiff in error, *v.* The Emma and Last Chance Consolidated Mining Company *et al.*, filed August 8th, 1889, first, the instruction given by the court to the jury, found
434 folio 64. Then I offer in evidence the judgment commencing at folio, in folio 43, page 28, and extending down to folio 48, in which the verdict of the jury in favor of the defendants. Then I offer in evidence the decision of the supreme court of Idaho, confirming that judgment, and I offer in evidence the decision of the Supreme Court of the United States, which I will bring into court, confirming the judgment of the supreme court of Idaho. That makes a complete record in the case. Let the record show that the Stemwinder Mining Company there is the grantor, predecessor in interest of the plaintiff in this action so far as its claim to the Stemwinder is concerned. That the Emma and Last Chance Consolidated Mining Company is the grantor, predecessor in interest of the Last Chance Mining Company, the present owner of the Emma mining claim.

The COURT: These are admitted.

Mr. McBRIDE: We insist they are entirely inadmissible on the ground that they are not the same parties.

The COURT: Overrule it. I have introduced it.

(Thereupon the writings last offered were admitted in evidence and designated as Plaintiff's Exhibit "D." A copy of said exhibit is to be found beginning on page 319 of this record, and is made a part hereof.)

Mr. HEYBURN: That is all of the rebuttal.

The COURT: I suppose you rest now on both sides?

(None of the counsel answer in the negative.)

435 PLAINTIFF'S EXHIBIT "A."

(Certified copy of Shoshone notice. A copy of said exhibit is to be found in the case of Royal J. Rutter and F. W. Bradley *v.* Shoshone Mining Company.)

PLAINTIFF'S EXHIBIT "B."

Notice of Location of Quartz Claim.

Notice is hereby given that the undersigned corporation, organized and existing under the laws of the State of Idaho, conforming to the mining laws thereof, and of the State of Idaho, and the local rules, regulations, and customs of miners, has this 14th day of August, A. D. 1896, located and does claim seven hundred and eleven (711) linear feet on this lode, lead, or vein of mineral-bearing rock in place, by four hundred and ten (410) feet in width, the same being 220 feet on each side of the center thereof, at the point of discovery, together with all dips, spurs, and angles, and all other veins or lodes, the top or apex of which lie within said boundaries. This location is named the "Ibex" mining claim, and is situated in the Yreka mining district in Shoshone county, State of Idaho, and bounded and described as follows, to wit:

Commencing at a point immediately over the point of discovery at the location notice which is posted at a point 30 feet east of the westerly center end stake, which said westerly center end
436 stake is 240 feet from corner No. 1, of official survey No. 1126, said location notice being about 1,000 feet directly over the point of discovery; thence running 36 feet to the said westerly center end stake; thence N. 41 degrees east, 210 feet to the northwesterly corner stake; thence N. 88 degrees 4 minutes east, 383 feet to the northeasterly corner stake; thence south 11 degrees 58 minutes east, 160 feet to the easterly center end stake; thence continuing in the same course 160 feet to the southeasterly corner stake; thence south 87 degrees 50 minutes west, 711 feet to the southwesterly corner stake; thence north 41 degrees east, 220 feet to the westerly center end stake and place of beginning.

The discovery upon which this location is based is made in a solid body of galena ore uncovered and discovered at a point directly under the point where the notice of location is posted, in a tunnel or drift now being worked and mined by the locator hereof.

The adjoining claimants are the Last Chance lode on the north, the Sold Again lode on the south, the Stemwinder on the east, and the Shoshone on the west, situated one-half mile southwest of Wardner on the west side of Milo creek, in Yreka mining district, Shoshone county, Idaho.

Discovered June 20th, 1896.

Located Aug. 14th, 1896.

THE SHOSHONE MINING COMPANY,
Locator and Claimant.

437 STATE OF IDAHO, }
County of Shoshone, } ss.:

I, W. B. Heyburn, do solemnly swear that I am the vice-president of the Shoshone Mining Company, a corporation duly organized and existing under the laws of the State of Idaho; that I am acquainted

with the mining ground described in this notice of location and herewith called the "Ibex" ledge, lode, or claim; that the ground and claim therein described, or any part thereof, has not, to the best of my knowledge and belief, been located according to the laws of the United States and of this State, or if so located that the same has been abandoned or forfeited by reason of the failure of such former locators to comply in respect thereto with the requirements of said laws, and that I have opened new ground to the extent and depth of ten feet as required by the laws of Idaho.

W. B. HEYBURN.

Subscribed and sworn to before me this 14th day of August, A. D. 1896.

[SEAL.] E. M. HEYBURN,
Notary Public.

(Endorsed:) Original. No. 944. Notice of location of "Ibex" lode, Yreka mining district, Shoshone Co., Idaho. Shoshone Mining Company, locator. Dated Aug. 14th, 1896. Recorded at the request of W. B. Heyburn, Aug. 21, 1896, at 1 o'clock p. m., in Book "N" of Quartz, page 487, records of Shoshone county, State of Idaho. Barry N. Hillard, county recorder, by L. A. Doherty, deputy recorder. Clg.

438 PLAINTIFF'S EXHIBIT "C."

UNITED STATES LAND OFFICE,
CŒUR D'ALENE, IDAHO.

In the Matter of the Application of ROYAL J. RUTTER and F. W. BRADLEY for a Patent for the "Kirby Fraction" Lode Mining Claim, in the S. W. Half of Section 12, Township 48 N., Range 2 E., Boise Meridian, in the Yreka Mining District, in Shoshone County, State of Idaho.

To the register and receiver of the United States land office at Cœur d'Alene, Idaho, and to the said Royal J. Rutter and Frederick W. Bradley, applicants aforesaid:

Whereas, the said Royal J. Rutter, on behalf of himself and his co-owner, Frederick W. Bradley, did on the 23d day of July, 1896, as appears from the published notice thereof, hereinafter appended, file in the said land office of the United States at Cœur d'Alene, in said land district, a certain plat of a survey of a certain lode mining claim, together with an application for a United States patent for the same, calling the said lode claim the "Kirby Fraction,"
439 and alleging that said lode claim was situated in the Yreka mining district in Shoshone county, Idaho, describing the same in the plat and field-notes filed therewith, and the said applicants did on the 1st day of August, 1896, by the publication of a notice in the "Wardner News," a newspaper published in the town of Wardner in said Shoshone county, Idaho, give notice that they would apply for a United States patent for the premises as aforesaid, which notice was as follows:

Application for a Patent.

No. 205.

UNITED STATES LAND OFFICE,
COEUR D'ALENE, IDAHO, *July* 23, 1896.

Notice is hereby given that in pursuance of chapter six of title thirty-two of the Revised Statutes of the United States, Royal J. Rutter (on behalf of himself and his co-owner, Frederick W. Bradley), whose post-office is Wardner, Shoshone county, Idaho, has made application to the United States for a patent for the Kirby Fraction Lode mining claim, designated as mineral survey No. 771, situate in Yreka mining district, county of Shoshone, and State of Idaho, and which is more fully described as to metes and bounds by the official plat, and by the field-notes of survey thereof now filed in the office of the register of the district of lands subject to sale at Coeur d'Alene city, State of Idaho, which field notes of survey describe
440 the boundaries and extent of said claim on the surface with magnetic variations at 21 degrees 50 minutes east, as follows, to wit: Beginning at point of discovery, where notice of location was originally posted, whence mouth of tunnel bears N. 88 degrees 21 minutes E., 10 feet; thence runs in a southerly direction 192 feet; thence N. 88 degrees 21 minutes E., along the course of the vein as near as practicable 90 feet to center of easterly end line to a post four inches square, 5½ feet long, 2 feet in the ground, with mound of earth, marked E. E. C., 771; thence N. 16 degrees 30 minutes E., 82 feet to corner No. 1 of claim, a pine post 4 inches square, 5½ feet long, 2 feet in the ground, with mound of earth marked 1–771, whence corner No. 1, survey No. 603, Stemwinder lode, bears N. 42 degrees 20 minutes E., 134 feet distant; and corner No. 2, survey No. 550, Emma lode, bears S. 64 degrees 41 minutes E., 180.7 feet; location corner bears N. 42 degrees 50 minutes W., 116 feet distant; corner No. 4, survey No. 551, Last Chance lode, bears S. 88 degrees 4 minutes W., 657.1 feet distant; Haystack Mt. bears N. 43 degrees E.; a prominent peak, bears N. 70 degrees 15 minutes E.; corner No. 1, Shoshone lode, bears N. 86 degrees 36 minutes W., 256 feet distant; thence N. 79 degrees 28 minutes W., 354.4 feet, to intersect line 1–2, survey 1126, Shoshone lode, at N. 62 degrees W., 105.48 feet, from corner No. 1, 658.94 feet, intersect line 4–1, survey No. 551, at N. 3 degrees 33 minutes E., 142.9 feet from corner No.
441 4, 857.3 feet, to corner No. 2, identical with location corner, a post 4 inches square 5½ feet long, 2 feet in ground, with mound of earth, and stone marked 2–771; whence a pine stump 5½ feet high, 5 inches in diameter, blazed and marked 2.771 B. O., bears N. 52 degrees, 45 minutes W., 86 feet distant; a tamarack tree 11 inches in diameter, blazed and marked 2.771 B. T. bears S. 57 degrees, 45 minutes E., 13.7 feet distant; Haystack Mt. bears N. 50 degrees E.; Sacred Mt. bears S. 15 degrees, 55 minutes E.; thence S. 16 degrees, 30 minutes W., 272 feet to west end center post, 4 inches square, 5½ feet long, set 2 feet in the ground, with mound of

earth and stone, marked W. E. C. 771; whence discovery point bears N. 88 degrees, 21 minutes E., 803.5 feet distant, 443.06 feet intersect line 5–6, survey No. 1126, at N. 62 degrees W., 125.44 feet, from corner No. 6, 539.3 feet to corner No. 3, identical with location corner, a post 4 inches square, 5½ feet long, 2 feet in the ground, with mound of earth and stone, marked 3–771, whence corner No. 2, survey No. 993, Sold Again Fraction lode, bears N. 45 degrees 10 minutes E., 45.2 feet distant, a pine tree 12 inches in diameter, blazed and marked 3–771 B. T., bears S. 26 degrees W. 66 feet distant, a pine tree 9 inches in diameter, blazed and marked 3–771, bears N. 22 degrees 50 minutes E., 8 feet distant; Haystack Mt. bears N. 47 degrees 20 minutes E.; a prominent peak bears N. 13 degrees 15 — W.; thence N. 84 degrees 27 minutes E., 20.85 ft. intersect line 2–3, survey No. 933, at S. 19 degrees .06 minutes W., 31.49 feet from corner No. 2, 519.18 ft.; intersect
442 line 1–2 survey, No. 933, at N. 87 degrees 50 minutes E., 485.09 feet from corner No. 2, 918.5, to corner No. 4, a post 4 inches square, 5½ ft. long, 2 feet in the ground, with mound of earth, marked 4–771, whence location corner bears N. 84 degrees 27 minutes E., 317 feet distant; corner No. 1, survey No. 579, Bunker Hill lode, bears S. 47 degrees 01 minute E., 263.9 feet distant, ¼ section corner between sections 12 and 13, T. 48 N., R. 2 E., Boise meridian, bears S. 51 degrees 58 minutes E., 606.8 feet distant; shaft 4 by 6 feet, 15 feet deep bears N. 53 degrees 45 minutes W., 120 feet distant; a fir stump 15 inches in diameter, 4½ feet high, blazed and marked 4–771 B. O., bears N. 49 degrees 40 minutes W., 20 feet distant; a fir stump 18 feet high, 2 feet in diameter, blazed and marked 4–771 B. O., bears S. 80 degrees 20 minutes E., 38.2 feet distant; Haystack Mt. bears N. 41 degrees 30 minutes E.; a prominent peak bears N. 1 degree 10 minutes W.; thence N. 16 degrees 13 minutes E., 283.6 feet, to corner No. 1, the place of beginning. The survey of exterior boundaries.

Total area of survey of Kirby Fraction claim, 8.057 A. Conflict with survey No. 1126 (claimed), 5.243 acr. Conflict with survey No. 551 (not claimed), 1.072 acr. Conflict with survey No. 933 (not claimed), 0.163 acr. Net area claimed by survey No. 771 6.822 acr. Forming a portion of S. W. ¼ section 12, T. 48 N., R. 2 E., Boise meridian, U. S. surveys. The said mining claim being of record in
443 the office of the county recorder at Murray, in the county and State aforesaid, the said mining claim being designated on the official plat and field-notes of survey as survey No. 771.

The adjoining claims are as follows: Last Chance, Sold Again, Fraction, Shoshone mining claims.

Any and all persons claiming adversely the mining ground, vein, lode, premises, or any portion thereof so described, surveyed, platted, and applied for, are hereby notified that unless their adverse claims are duly filed as according to law, and the regulations thereunder, within the time prescribed by law, with the register of the U. S. land office at Cœur d'Alene, in the State of Idaho, they will be barred, in virtue of the provisions of said statute.

JAMES GRAHAM, *Register.*

First publication August 1, 1896.

Whereas, the first publication of the said notice in said newspaper was on the first day of August, 1896, in said "Wardner News," a weekly newspaper published at Wardner, as aforesaid, in the State of Idaho.

Now, therefore, the Shoshone Mining Company, a corporation, organized and existing under the laws of the State of Idaho, having its principal place of business at Osburn in said Shoshone county, and whose post-office address is Osburn, Shoshone county, Idaho, does now, on this 9th day of September, 1896, enter this its protest and adverse claim against the issuance of a patent to the said Royal J. Rutter and F. W. Bradley upon their pretended
444 claim upon the said Kirby Fraction Lode claim, as set forth in said plat and field-notes as aforesaid, for the following reasons, to wit:

I.

Because the surface ground and veins or lodes contained therein, as set forth and described in the plat and field-notes of the said Kirby Fraction Lode claim, or the greater portion thereof, are not the property of the said applicants, or either of them, neither are they entitled to hold the same under or by virtue of the local laws, rules, and customs of the miners in said district, or the laws of the State of Idaho, or the statutes of the United States relating to mining claims.

II.

Because a great portion of the premises described in the said plat and notice of said applicants, and claimed by them, as the so-called Kirby Fraction Lode mining claim, is owned and claimed adversely by this protestant as the "Shoshone" Lode mining claim, as will appear by a reference to the abstract or title herewith filed and made a part of this protest, and marked Exhibit "A," and by the plat showing the boundaries of the said "Shoshone" mining claim and its conflict with the alleged "Kirby Fraction" Lode mining claim. And this protestant did on the 21st day of August, 1895, make an application for a United States patent in the said
445 land office for the said "Shoshone" Lode mining claim, which said application was made and filed in due form, and an order for a publication of the notice of the same was duly made and published in the newspaper aforesaid, beginning on August 24th, 1895. And on the 22d day of October, 1895, the said Royal J. Rutter and Frederick W. Bradley did file an adverse claim and protest against the issuance of a patent for the said "Shoshone" Lode mining claim, including all of the ground in controversy between the said "Shoshone" claim and the said alleged "Kirby Fraction" claim, and a suit is now pending in the United States circuit court for the district of Idaho, northern division, for the purpose of determining the title and the right of possession of the ground in conflict between the said "Kirby Fraction" and the said "Shoshone" Lode mining claim, for which the said Royal J. Rutter and Frederick W. Bradley are assuming to apply for a patent in this proceeding, disregarding the fact that the title to the right of

possession of the ground so in controversy as aforesaid, is now
volved in an action pending in the said United States circuit co
and undetermined therein, wherein each and every question of t
that can or may be raised by either party to the said ground is
issue to be determined by that court.

III.

Because this protestant has held, occupied, and possess
446 that portion of the said premises applied for as the "Kir
Fraction" Lode mining claim, which belongs to the sa
Shoshone mining claim, as a part thereof, since the 21st day
March, 1894, and has mined upon and occupied said ground co
tinuously since said time. Such occupation and possession of th
protestant of the ground in controversy has been, under and
virtue of a full compliance with the local laws, rules, and custo
of the said mining district, the laws of the State of Idaho and
the United States pertaining to mineral lands.

IV.

Because this protestant has held, occupied, and possessed all
that portion of the so-called "Kirby Fraction" Lode mining clai
as represented on the plat of survey made by W. C. Miller, depu
U.S. mineral surveyor, showing the conflict between the "Shoshon
claim and the said "Kirby Fraction" claim filed herewith, marke
Exhibit "B," and made a part of this protest, and has held, occupie
and possessed the same as a *bona fide* owner by purchase for a val
able consideration from the original discoverer and locator of th
said "Shoshone" mining claim, as shown by said abstract of title.

V.

Because on the 21st day of March, 1894, the ground and premise
in controversy were unoccupied, unappropriated, vacan
447 mineral lands belonging to the United States, subject to loca
tion and purchase under the provisions of law regulating th
purchase of mining claims, and on said 21st day of March, 189
W. C. Miller, who was then and there a citizen of the United State
over the age of twenty-one years, made a valid discovery of a lod
or ledge of mineral-bearing rock, in place containing silver an
lead, within the boundaries of the said "Shoshone" mining claim
and then and there located said "Shoshone" mining claim upo
said discovery, by posting a notice of such discovery and location a
the point on the surface immediately above the said discovery o
mineral, and by so distinctly marking the location upon the groun
that its boundaries can be readily traced, and thereafter, on the 26th
day of March, 1894, the said locator caused to be recorded in the
proper office a copy of location notice so posted as aforesaid, whic
said notice so recorded contained the name of the claim, the date o
location, the number of feet claimed in each direction from the
point of discovery, the name of the locator and such a description
of the claim, with reference to natural objects and permanent monu-

ments, as would fix the location thereof. And on the 26th day of March the said locator, by good and sufficient deed of conveyance made, executed, and delivered by him to this protestant, The Shoshone Mining Company, conveyed the said Shoshone mining claim to the protestant herein, who has since said 26th day of
448 March, 1894, occupied, mined upon, and possessed the said "Shoshone" mining claim, and is now in the possession thereof working and mining thereon. And this protestant has during each and every year since the said 26th day of March, 1894, expended in labor and improvements upon the said Shoshone mining claim more than one hundred dollars.

VI.

Because on the 20th day of June, 1896, the ground and premises shown by the plat hereto annexed to be in conflict with the "Ibex" Lode mining claim, which plat is marked Exhibit "C" and made a part of this protest, was unappropriated public mineral lands of the United States, and subject to location as such, and on said 20th day of June, 1896, the plaintiff made a discovery of a lode of mineral-bearing rock in place, within the boundaries of the said "Ibex" Lode claim, which said rock contained silver and lead in paying quantities, and thereafter, on the 14th day of August, 1896, this protestant, The Shoshone Mining Company, did locate the said "Ibex" Lode mining claim upon said discovery, by posting a notice of said location immediately over the point of discovery, and by so distinctly marking the boundaries of said "Ibex" claim upon the ground that its boundaries could and can be readily traced.

And thereafter, on the 21st day of August, 1896, this protestant did cause to be filed in the office of the recorder of Shoshone
449 county, Idaho, what was substantially a copy of the notice of location so posted as aforesaid, a certified copy of which said notice so recorded as aforesaid is hereto annexed, marked Exhibit "D" and made a part of this protest.

That by reason of the said discovery and location of the said "Ibex" Lode claim, this protestant is the owner of and entitled to the possession of all of that portion of the ground and premises included in the application of the said Royal J. Rutter and F. W. Bradley for a patent on the Kirby Fraction Lode mining claim, as shown by said plat and marked Exhibit "C," and by the certified abstract of title hereto annexed, marked Exhibit "E" and made a part of this protest.

That by reason of the location and ownership of the said "Shoshone" Lode mining claim and the said "Ibex" Lode mining claim by this protestant, the said applicants for patent on the said "Kirby Fraction" Lode mining claim are not entitled to receive a patent for that portion of the said "Kirby Fraction" claim covered by and included within the said "Shoshone" and the said "Ibex" locations.

VII.

Because the said "Kirby Fraction" Lode mining claim, for which application for patent has been made, and against which this

protest is filed, is not now, and was not on the 21st day of March, 1894, or at any time since, a valid location or an existing mining claim.

450 And for the further reason that neither the applicants for patent for the said "Kirby Fraction" Lode claim, nor any person authorized to represent them or any owners or claimants of the said "Kirby Fraction" Lode claim, did perform any annual labor or expend any sum in labor and improvements upon the said "Kirby Fraction" Lode claim during the years 1894 or 1895, and have not since resumed work thereon.

Therefore, this protestant enters its protest and adverse claim against the issuance of a patent to the said Royal J. Rutter and F. W. Bradley, or either of them, for the said portion of the "Kirby Fraction" Lode claim so in conflict with the said "Shoshone" Lode claim so as aforesaid and the said "Ibex" Lode claim so as aforesaid.

Wherefore, this protestant prays that all proceedings upon said application for patent for the said "Kirby Fraction" Lode mining claim shall be stayed until the question of the title to the right of possession of that portion thereof in conflict with the said "Shoshone" Lode claim and the said "Ibex" Lode claim can be determined in a court of competent jurisdiction.

SHOSHONE MINING COMPANY,
By W. B. HEYBURN, *Vice-President.*

Attest:
[SEAL.] W. B. SAMS, *Secretary.*

451 STATE OF IDAHO, }
County of Shoshone, } ss:

On this 9th day of September, 1896, before me, the subscriber, a notary public, in and for said county and State, personally appeared the above-named W. B. Heyburn, who, being first duly sworn, deposes and says that he is the vice-president of the Shoshone Mining Company, the adverse claimant named in the foregoing protest and adverse claim duly subscribed by him; that he has read the foregoing protest and knows the contents thereof; that the same is true in substance and in fact, as he verily believes, and that the said adverse claim is made in good faith to protect the better and prior title of the adverse claimant.

W. B. HEYBURN.

Subscribed and sworn to before me this 9th day of September, A. D. 1896.

[NOTARIAL SEAL.] E. M. HEYBURN,
Notary Public.

EXHIBIT "A."

Abstract of title to "Shoshone" lode and mining claim, Yreka mining district, Shoshone county, State of Idaho.

452

1.

Notice of Location.

W. C. Miller (locator). { Dated March 21, 1894; recorded March 26, 1894, Book "N" of Quartz Locations, page 216.

Description.

Locating and claiming 1,500 feet in length, by 600 feet in width, on the "Shoshone" lode, in the Yreka mining district, Shoshone county, State of Idaho, near the town of Wardner and on a mountain lying between Milo and Deadwood gulches.

2.

Deed.

W. C. Miller (grantor) to The Shoshone Mining Company, a corporation (grantee). } Dated March 26, 1894; recorded March 26th, 1894, Book 6 of Deeds, page 269; consideration, 499,900 shares of stock.

Description.

All that certain lode mining claim known as and called the "Shoshone," situated in the Yreka mining district, Shoshone
453 county, Idaho; also all that certain lode mining claim known as and called the "Summit," situated in the Yreka mining district, Shoshone county, Idaho.

Being the same claims located on the 21st day of March, A. D. 1894, by the party of the first part, and recorded in the office of the recorder of said county.

Acknowledged before E. M. Heyburn, notary public, Shoshone county, State of Idaho.

3.

Articles of Incorporation.

The Shoshone Mining Company. { Dated March 20th, 1894; filed March 21st, 1894; one file.

Description.

Object of incorporation: To locate, purchase, bond, lease, rent, and acquire mineral lands, mining claims, lodes, ledges, water, water rights, the use of water for mining and milling, concentrating power and domestic uses, mills, machinery, smelters, concen-

trators, and mining machinery; to construct, purchase, lease, and bond flumes, ditches, aqueducts, tramways, wagon roads, railroads for mining purposes, and for use of mines and mills; to buy and sell ores, minerals, and metals; to construct, operate, and maintain mining, milling, and smelting machinery, and all classes of machinery incident and necessary to mining, milling, smelting,
454 and concentrating ores and operating mines and mills; to sell and dispose of any and all property acquired under the provisions of this section; to make and issue obligations for the payment of debts contracted by this corporation; to raise money to pay said debts or discharge such obligations; to mortgage any and all property acquired by this corporation.

Principal place of business; Osburn, Idaho. Term of existence, 50 years; capital stock, $2,500,000, divided into 500,000 shares of the par value of $5 per share.

Incorporators: W. B. Sams, W. C. Miller, E. M. Gilpin, A. G. Kerns, and C. W. Betts.

Acknowledged before E. M. Heyburn, notary public, Shoshone county, Idaho, by all of said incorporators.

4.

Notice of Intention to Hold and Work Mining Claim.

Shoshone Mining Company, by its agent, W. B. Heyburn. } Dated November 28th, 1894; recorded November 30th, 1894, Book "K" of Miss., page 442.

Description.

Giving notice that the owner of the "Shoshone" and "Summit" Lode mining claims, situated in the Yreka mining district, Shoshone county, State of Idaho, being desirous of taking the benefit of the act of Congress, entitled "An act to amend section 2324 of
455 the Revised Statutes of the United States, relating to mining claims," approved July 18, 1894, hereby declares that it in good faith intends to hold and work said mining claims.

(5.)

Proof of Labor.

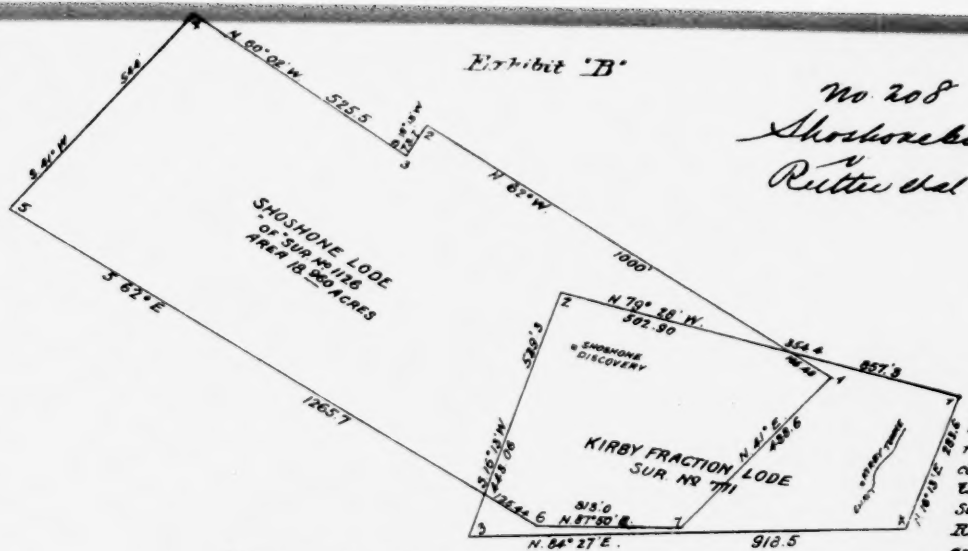
Charles Sweeney (affiant). } Dated December 12th, 1895; recorded December 26th, 1895, Book "A" of Affidavits, page 107.

Description.

Certifying that at least $100 worth of work or improvements were performed or made upon the "Shoshone" lode, situated in Yreka mining district, county of Shoshone, State of Idaho, and that such expense was made by, for, or at the expense of the Shoshone Mining Company, the owner of said claim, for the purpose of holding said claim.

Exhibit "B"

No 208
Shoshonebs } p. 458a
v
Rutter et al



DESCRIPTION OF CONFLICT

BEG. AT N.W. COR. OF KIRBY FRACTION

TH	S. 16° 13' W.	443' 06 FT	
"	S 62° E.	125' 44	"
"	N. 87° 50 E.	313'	"
"	N. 41° E.	438' 6	"
"	N. 62° W.	105' 48	"
"	N 79 28 W.	502' 90	"

TOTAL AREA SHOSHONE AREA IN CONFLICT WITH THE KIRBY FRACTION LODE — 18.960 ACRES, 5.24 ACRES

I hereby certify that the above diagram correctly represents the conflict claimed to exist between the Kirby Fraction Lode Survey No 771 Royal J. Rutter et al claimants and the Shoshone Lode of Consolidated Survey No 1126 Shoshone Mining Company claimants as actually surveyed by me. Situate in Yreka Mining District Shoshone Co. Idaho.

NORTH

SCALE

W. Clayton Miller
U.S. Deputy Mineral Surveyor.
Aug. 20. 1896.

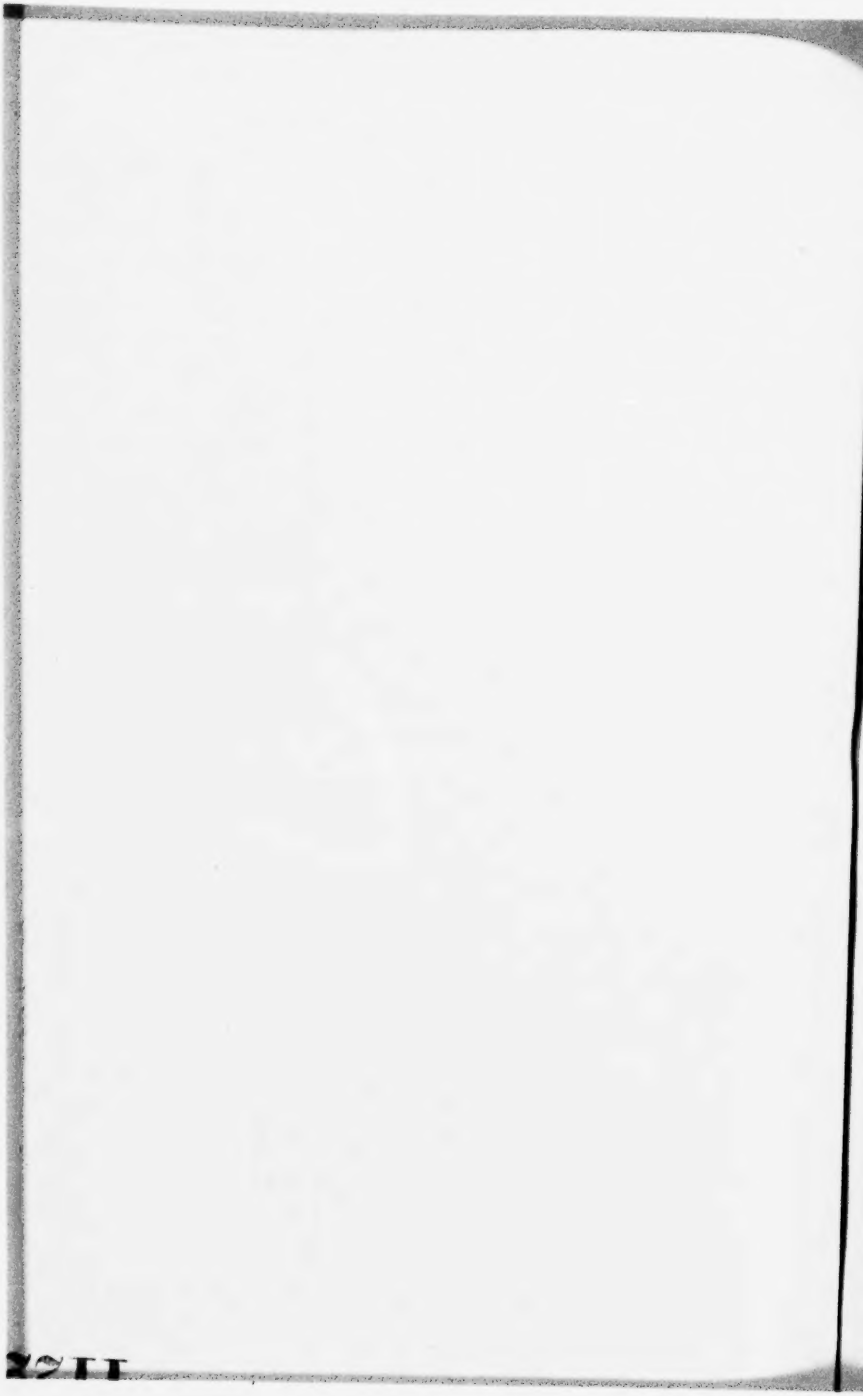
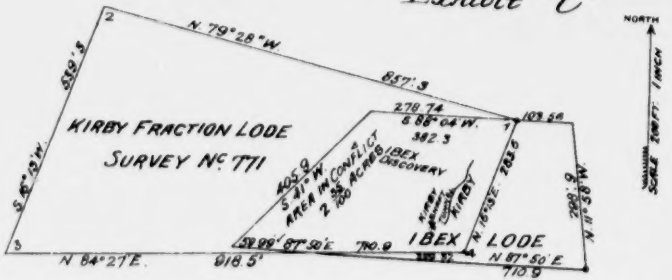

2211

Exhibit "C"

No. 208
Shoshone Co. } p 456
v.
Rutter et al



I hereby certify that the above diagram correctly represents the conflict claimed to exist between the Kirby Fraction Lode Survey No. 771. Royal J. Rutter et al Claimants and the Ibex Lode, Shoshone Mining Company, Claimants as actually surveyed by me, situated in Yreka Mining District Shoshone Co. Idaho.

W. Clayton Miller
U.S. Dep. Min. Surveyor
Aug. 20th 1896.

DESCRIPTION OF CONFLICT

BEG. AT N.E. COR. OF KIRBY FRACTION

TH.	S. 88° 04' W.	278.74 FT.
TH.	S. 41° W.	405.9 "
"	N. 87° 50' E.	59.99 "
"	N. 84° 27' E	399.32 "
"	N. 16° 13' E.	283.6 "

TOTAL AREA IBEX LODE = 3.77 ACRES
AREA IN CONFLICT WITH THE
KIRBY FRACTION LODE = 2.35 "

Sworn to before J. E. Gyde, notary public, Shoshone county, Idaho.

STATE OF IDAHO, }
County of Shoshone, } ss:

456 I, Barry N. Hillard, county recorder in and for Shoshone county, State of Idaho, do hereby certify the foregoing abstract of title from item No. one to item No. five (inclusive) to be a true and correct abstract of title to said property as the same appears upon the records of said Shoshone county on the 5th day of September, A. D. 1896, at 12 o'clock m. of said day.

Witness my hand and official seal this 5th day of September, A. D. 1896.

[SEAL.]

BARRY N. HILLARD,
County Recorder.

(Copy.)

In the Matter of the Adverse Claim Filed on Behalf of the "Shoshone" Lode Mining Claim in the Yreka Mining District, Shoshone County, Idaho, against the Application for Patent of Royal J. Rutter and F. W. Bradley on the Kirby Fraction Lode Mining Claim.

This is to certify that I, W. Clayton Miller, a United States deputy mineral surveyor for the State of Idaho, and the same person who made the adverse survey and plat filed with said protest and adverse claim, have examined the amount of work and development upon the said "Shoshone" Lode mining claim, performed by the adverse claimants and its predecessors in interest, and I find that the same consists of drifts, raises, inclines, and stopes, and exceeds in value five hundred dollars.

W. CLAYTON MILLER,
U. S. Dep. Min. Surveyor.

(Here follows diagram marked pp. 456*a* & 456*b*.)

457 STATE OF IDAHO, }
County of Shoshone, } ss:

Subscribed and sworn to before me this 2d day of October, A. D. 1896.

[SEAL.]

J. E. GYDE,
Notary Public.

In the Matter of the Adverse Claim Filed on Behalf of the "Ibex" Lode Mining Claim, in the Yreka Mining District, Shoshone County, Idaho, against the Application for Patent of Royal J. Rutter and F. W. Bradley on the "Kirby Fraction" Lode Mining Claim.

This is to certify that I, W. Clayton Miller, a United States deputy mineral surveyor for the State of Idaho, and the same person who

made the adverse survey and plat filed with said protest and adverse claim, have examined the amount of work and development upon the said "Ibex" Lode mining claim performed by the adverse claimant and its predecessors in interest, and I find that the same consists of a discovery, drift, and stope under ground above level of Sweeney tunnel; exceeds in value five hundred dollars.

W. CLAYTON MILLER,
U. S. Dep. Min. Sur.

458 STATE OF IDAHO, }
County of Shoshone, } ss:

Subscribed and sworn to before me this 2d day of October, A. D. 1896.

[SEAL.]

J. E. GYDE,
Notary Public.

EXHIBIT "D."

Notice of Location of Quartz Claim.

Notice is hereby given that the undersigned corporation, organized and existing under the laws of the State of Idaho, conforming to the mining laws thereof, and of the State of Idaho, and the local rules, regulations, and customs of miners, has this 14th day of August, A. D. 1896, located and does claim seven hundred and eleven (711) linear feet on this lode, lead, or vein of mineral-bearing rock in place, by four hundred and ten (410) feet in width, the same being 220 feet on each side of the center thereof at the point of discovery, together with all dips, spurs, and angles, and all other veins or lodes, the top or apex of which lie within said boundaries. This location is named the "Ibex" mining claim, and is situated in the Yreka mining district in Shoshone county, State of Idaho, and bounded and described as follows, to wit:

Commencing at a point immediately over the point of discovery, at the location notice which is posted at a point 30 feet east of
459 the westerly center end stake, which said westerly center end stake is 240 feet from corner No. 1 of official survey No. 1126, said location notice being about 1,000 feet directly over the point of discovery; thence running 36 feet to the said westerly center end stake; thence N. 41 degrees east, 210 feet to the northwesterly corner stake; thence N. 88 degrees 4 minutes east, 383 feet to the northeasterly corner stake; thence south 11 degrees 58 minutes east, 160 feet to the easterly center end stake; thence continuing in the same course 160 feet to the southeasterly corner stake; thence south 87 degrees 50 minutes west, 711 feet to the southwesterly corner stake; thence north 41 degrees east, 220 feet to the westerly center end stake and place of beginning.

The discovery upon which this location is based is made in a solid body of galena ore, uncovered and discovered at a point directly under the point where the notice of location is posted, in a tunnel or drift now being worked and mined by the locator thereof.

The adjoining claims are the Last Chance lode on the north,

the Sold Again lode on the south, the Stemwinder on the east, and the Shoshone on the west, situated one-half mile southwest of Wardner on the west side of Milo creek, in Yreka mining district, Shoshone county, Idaho.

Discovered June 20th, 1896.

Located August 14th, 1896.

THE SHOSHONE MINING COMPANY,
Locator and Claimant.

460 STATE OF IDAHO, } *ss:*
County of Shoshone, }

I, W. B. Heyburn, do solemnly swear that I am the vice-president of the Shoshone Mining Company, a corporation duly organized and existing under the laws of the State of Idaho; that I am acquainted with the mining ground described in this notice of location and herewith called the "Ibex" lode or claim; that the ground and claim therein described, or any part thereof, has not, to the best of my knowledge and belief been located according to the laws of the United States and of this State, or, if so located that the same has been abandoned or forfeited by reason of the failure of such former locators to comply in respect thereto with the requirements of said laws, and that I have opened new ground to the extent or depth of ten feet as required by the laws of Idaho.

W. B. HEYBURN.

Subscribed and sworn to before me this 14th day of August, A. D. 1896.

E. M. HEYBURN,
Notary Public.

Recorded at the request of W. B. Heyburn, Aug. 21, 1896, at 1 o'clock p. m., in Book "N" of Quartz, page —, records of Shoshone county, State of Idaho.

BARRY N. HILLARD,
County Recorder,
By L. A. DOHERTY,
Deputy Recorder.

461 STATE OF IDAHO, } *ss:*
County of Shoshone, }

I, Barry N. Hillard, county recorder in and for said Shoshone county, do hereby certify that the foregoing copy of notice of location of the "Ibex" Lode mining claim has been by me compared with the original, and that it is a correct transcript therefrom, as the same appears of record in Book "N" of Quartz, records of said Shoshone county.

In testimony whereof, I hereunto set my hand and affix my official seal at Murray, Idaho, this 21st day of August, A. D. 1896.

[SEAL.]

BARRY N. HILLARD,
County Recorder,
By L. A. DOHERTY, *Deputy.*

(Endorsed:) Certified copy. Notice of location of the "Ibex" Lode mining claim, Yreka mining district, Shoshone county, Idaho.

EXHIBIT "E."

Abstract of title to "Ibex" lode and mining claim, Yreka mining district, Shoshone county, State of Idaho.

462 (1.)

Notice of Location.

Shoshone Mining Company, locator and claimant. } Dated Aug. 14th, 1896; recorded Aug. 21st, 1896, Book "N" of Quartz Locations, page 487.

Description.

Locating and claiming 711 linear feet on this lode, lead, or vein of mineral-bearing rock in place, by 410 feet in width, the same being 220 feet on each side of the center thereof, at the point of discovery, together with all dips, spurs, and angles, and all other veins or lodes the top or apex of which lie within said boundaries.

This location is named the "Ibex" mining claim, and is situated in the Yreka mining district in Shoshone county, State of Idaho, and bounded and described as follows, to wit:

Commencing at a point immediately over the point of discovery, at the location notice which is posted at a point 30 feet east of the westerly center end stake, which said westerly center end stake is 240 feet from corner No. 1 of official survey No. 1126, said location notice being about 1,000 feet directly over the point of discovery, thence running 36 feet to the said westerly center end stake; thence N. 41 degrees east 210 feet to the northwesterly corner stake;
463 thence north 38.4 degrees east, 383 feet to the northeasterly corner stake; thence south 11 degrees 58 minutes east, 160 feet to the easterly center end stake; thence continuing in the same course 160 feet to the southeasterly corner stake; thence south 87 degrees 50 minutes west, 711 feet to the southwesterly corner stake; thence north 41 degrees east, 220 feet to the westerly center end stake and place of beginning.

The discovery upon which this location is based is made in a solid body of galena ore uncovered and discovered at a point directly under the point where this notice of location is posted, in a tunnel or drift now being worked and mined by the locator hereof. The adjoining claimants are, the Last Chance lode on the north, the Sold Again lode on the south, the Stemwinder on the east, and the Shoshone on the west, situated one-half mile southwest of Wardner on the west side of Milo creek, Yreka mining district, Shoshone county, Idaho.

STATE OF IDAHO, } ss:
County of Shoshone, }

I, Barry N. Hillard, county recorder in and for Shoshone county, in the State of Idaho, do hereby certify the foregoing abstract of title of one item to be a true and correct abstract of title of said property, as the same appears upon the records of said county on the 5th day of September, A. D. 1896, at 12 o'clock m. of said day.

464 Witness my hand and official seal this 5th day of September, A. D. 1896.

[SEAL.]

BARRY N. HILLARD,
County Recorder.

(Copy.)

Articles of Incorporation.

Know all men by these presents, that we, the undersigned, have this 20th day of March, A. D. 1894, associated ourselves together for the purpose of forming a private corporation and hereby state:

First. That the corporate name of this corporation is the Shoshone Mining Company.

Second. That the object for which this corporation is formed is to locate, purchase bond, lease, rent and acquire mineral lands, mining claims, lodes, ledges, water, water rights, the use of water for mining, milling, concentrating power, and domestic uses, mills, machinery, smelters, concentrators, and mining machinery; to construct, purchase, lease and bond flumes, ditches, aqueducts, tramways, wagon roads, railroads, for mining purposes, and for the use of mines and mills; to buy and sell ores, minerals, and metals; to construct, operate, and maintain mining, milling, and smelting machinery, and all classes of machinery incident and necessary to mining, milling, smelting, and concentrating ores and operating mines and mills; to sell and dispose of any and all property acquired under
465 the provisions of this section; to make and issue obligations for the payment of debts contracted by this corporation; to raise money to pay said debts or discharge such obligations; to mortgage any and all property acquired by this corporation.

Third. The place where the principal business of this corporation is to be transacted is at Osburn, Idaho.

Fourth. The term for which this corporation shall exist shall be for fifty (50) years.

Fifth. The affairs of this corporation shall be managed and controlled by a board of five directors, and W. C. Miller, whose residence is at Wallace, Idaho, and W. B. Sams, whose residence is at Osburn, Idaho, and E. M. Gilpin, whose residence is at Osburn, Idaho, and A. G. Kerns, whose residence is at Wallace, Idaho, and E. W. Betts, whose residence is at Wallace, Idaho, are named and appointed as such directors for the first year.

Sixth. The amount of the capital stock of the corporation shall consist of two millions and five hundred thousand ($2,500,000) dol-

lars, and shall be divided into five hundred thousand (500,000) shares, of the par value of five ($5.00) per share.

Seventh. There is actually subscribed of the said capital stock the amount of one hundred (100) shares as follows:

W. C. Miller, twenty shares.
W. B. Sams, twenty shares.
E. M. Gilpin, twenty shares.
A. G. Kerns, twenty shares.
C. W. Betts, twenty shares.

466 In witness whereof, we have hereunto set our hands and affixed our seals this 20th day of March, A. D. 1894.

W. B. SAMS. [SEAL.]
W. C. MILLER. [SEAL.]
E. M. GILPIN. [SEAL.]
A. G. KERNS. [SEAL.]
C. W. BETTS. [SEAL.]

STATE OF IDAHO, } ss:
County of Shoshone, }

I hereby certify that on this 20th day of March, 1894, before me, the undersigned, a notary public in and for said county and State, personally appeared W. C. Miller, W. B. Sams, E. M. Gilpin, A. G. Kerns, and C. W. Betts, to me known to be the identical persons named in and who executed the foregoing articles of incorporation, and they, and each of them, acknowledged to me that they signed and sealed the same as their free and voluntary act and deed for the uses and purposes therein set forth.

In witness whereof, I have hereunto set my hand and official seal the day and year in this certificate first above written.

[SEAL.] E. M. HEYBURN,
Notary Public.

467 (Endorsed:) Articles of incorporation of the Shoshone Mining Company. Original. Filed March 21st, 1894. Barry N. Hillard, county recorder, Shoshone county, State of Idaho.

STATE OF IDAHO, } ss:
County of Shoshone, }

I, Barry N. Hillard, county recorder in and for said Shoshone county, do hereby certify that the foregoing copy of articles of incorporation of the Shoshone Mining Company has been by me compared with the original, and that it is a true and correct transcript therefrom, together with the indorsements thereon, as the same remains on file at my office and in my custody.

In testimony whereof, I hereunto set my hand and affix my official seal at Murray, Idaho, this 17th day of August, A. D. 1895.

[SEAL.] BARRY N. HILLARD,
County Recorder,
By L. A. DOHERTY, *Deputy.*

UNITED STATES LAND OFFICE,
COEUR D'ALENE LAND DISTRICT, IDAHO.

STATE OF IDAHO,
County of Kootenai, } ss:

I hereby certify that the foregoing is a true and correct copy of the adverse claim filed by the Shoshone Mining Company
468 against the issuance of patent to Royal J. Rutter and Frederick W. Bradley, applicants for patent for the Kirby Fraction lode, together with the indorsements thereon, as the same appears on file in this office.

Dated at the United States land office at Coeur d'Alene, Idaho, this 10th day of October, 1896.

JAMES GRAHAM, *Register.*

(Endorsed:) Certified copy. Articles of incorporation. Shoshone Mining Company.

Notice of Location.

Notice is hereby given that the undersigned is a citizen of the United States over the age of twenty-one years, and has discovered a ledge of mineral-bearing rock in place, bearing silver, lead, and other precious metals, at a depth of about twelve hundred (1,200) feet, directly over the point where this notice is posted, and, for the purpose of locating a mining claim based upon said discovery, has this day located and claims fifteen hundred (1,500) feet upon said ledge, together with three hundred (300) feet of surface ground on the northeasterly side thereof, and three hundred (300) feet of surface ground on the southwesterly side thereof. Said claim is situated in the Yreka mining district, Shoshone county, Idaho, near the town of Wardner, and on a mountain lying between
469 Milo and Deadwood gulches, and is more particularly described as follows:

Beginning at this location notice, which is posted at a point south eighty (80) degrees west, one hundred and forty-seven (147) feet from the southwest corner of survey No. 551, the "Last Chance" mining claim, and being about twelve hundred (1,200) feet directly over the point of discovery; thence running south sixty-two (62) degrees east, four hundred (400) feet, to the southeast corner end stake; thence north forty-one (41) degrees east, three hundred (300) feet to the northeast corner stake; thence north sixty two (62) degrees west, ten hundred (1,000) feet to corner No. two (2) on the southeast end, end line of survey No. 615, the "Skookum" Lode claim; thence south eighteen (18) degrees and thirteen (13) minutes west, along the southeast end line of the said "Skookum" Lode claim, one hundred (100) feet, more or less, to corner No. three (3), being the southeast corner No. four (4) of the said "Skookum" lode; thence along the southerly side line of the said "Skookum" lode north sixty (60) degrees west, five hundred and thirty (530) feet, more or less, to corner No. four (4); thence south forty-one (41) degrees west, two hundred and ten (210) feet, more or less, to the north-

west center and post; thence continuing in the same direction three hundred (300) feet to the southwest corner post; thence south sixty-two (62) degrees east, twelve hundred feet, more or less, to a point on the northerly side line of the "Sold Again" Lode
470 claim, marked by a post; thence northeasterly along the said north side line of the said "Sold Again" claim, four hundred feet, more or less, to a post; thence north forty-one (41) degrees east, sixty (60) feet, more or less to the southeast center end stake, the place of beginning.

All of which said stakes are upward of four (4) inches square and four (4) feet high.

And I hereby claim four hundred (400) feet running in a southeasterly direction, and eleven hundred (1,100) feet running in a northwesterly direction from this notice and the point of discovery thereunder, along the course of said ledge. The said mining claim to be known as and called the "Shoshone" Lode claim.

This claim is located and marked on the ground this twenty-first (21st) day of March, A. D. one thousand eight hundred and ninety-four. And it is the intention of the locator to work and mine the said lode through and by means of shafts and tunnels connecting the said discovery point with the surface of the ground.

Dated this twenty-first (21st) day of March, A. D. 1894.

W. C. MILLER, *Locator.*

STATE OF IDAHO, } ss:
County of Shoshone, }

I, W. C. Miller, do solemnly swear that I am acquainted with the mining ground described in the notice of location here-
471 with called the Shoshone ledge, lode, or claim, and that the ground and claim therein described, or any part thereof, has not, to the best of my knowledge and belief, been heretofore located according to the laws of the United States, and of the State of Idaho, or, if so located, that the same has been abandoned or forfeited by reason of the failure of such former locator to comply, in respect thereto, with the requirements of said laws.

W. C. MILLER.

Subscribed and sworn to before me this 23d day of March, A. D. 1894.

[NOTARIAL SEAL.] E. M. HEYBURN.

Recorded at the request of W. B. Heyburn, March 26th, 1894, at 9 o'clock a. m.

BARRY N. HILLARD,
County Recorder,
By S. W. SEARS, JR., *Deputy.*

STATE OF IDAHO, } ss:
County of Shoshone, }

I, Barry N. Hillard, county recorder in and for Shoshone county, in the State of Idaho, do hereby certify that the foregoing copy of the notice of location of the "Shoshone" Lode claim has been by me

compared with the original, and that it is a correct transcript
472 therefrom as the same appears of record in Book "N" of Quartz Locations, page 216, records of Shoshone county, State of Idaho.

In testimony whereof, I hereunto set my hand and affix my official seal the 8th day of September, A. D. 1896.

[SEAL.]

BARRY N. HILLARD,
County Recorder,
By L. A. DOHERTY, *Deputy.*

(Endorsed:) U. S. land office, Cœur d'Alene, Idaho. In matter of protest and adverse claim of the Shoshone Mining Co. *v.* Royal J. Rutter and F. W. Bradley, involving the "Shoshone," "Ibex," and "Kirby Fraction" Lode claims, Yreka mining district, Shoshone county, Idaho. Adverse, $54. Filed in the U. S. land office, Cœur d'Alene, Idaho, September 11, 1896. Notice registered all parties Sept. 11, 1896. James Graham, register.

(Endorsed:) Certified copy. Notice of location of the "Shoshone" Lode mining claim, Yreka mining district, Shoshone county, Idaho.

(Endorsed:) Adverse and protest claim of Shoshone Mining Co. against Kirby Fraction Lode mining claim.

PLAINTIFF'S EXHIBIT "D."

(An instruction given by the court to the jury in the case of The Stemwinder Mining Company, plaintiff, *v.* The Emma and
473 Last Chance Consolidated Mining Company, in folio 64 of Transcript of Record on appeal to the Supreme Court of the United States.)

"In addition to what I have read to you, I wish to add a few remarks merely as to your duty as jurors. You may have ever so much knowledge about mining law, and know all about customs and mining rules and regulations, but though you have the wisdom of Solomon they have nothing to do with your deliberations. You are sworn to decide the case on the evidence, and all of your knowledge, however accurate it may be, has nothing to do with this case. You must go according to the law and evidence in the case. I have stated the law to you very plainly, as it seems to me, as to what constitutes a valid location, and I shall further charge you this: That there is really but one question in this case. The whole case is practically limited to that question—that is, Who first made a valid location on this ground? That is really the whole question, stripped of the evidence and stripped of all the facts of the case; that is the point. Now, to determine the point you must go into all the evidence you have heard; reconcile it, if you can, and ascertain, if you can, who, in your judgment, to the best of your belief, first located—made a valid location—upon that ground. If you find that the plaintiff made the first valid location, the plaintiff is prior in point of time, and whatever may be all the facts in this case—I do not

care what they are—the plaintiff is entitled to a verdict at your hands. If you find, however, that the defendant made the first valid location, then the defendant is entitled to a verdict at
474 your hands. I state that to you so as to simplify the case and bring it down to the direct point in issue."

(*Proceedings in said Record from Folio* 43 *to Folio* 48.)

Fifty-sixth judicial day, Saturday, September 29th, A. D. 1888, June term, A. D. 1888.

THE STEMWINDER MINING COMPANY
vs.
THE EMMA AND LAST CHANCE CON. M'NG CO. ET AL. } No. 282.

At this day, all parties hereto being present in open court, and the jury having been duly polled, the trial of this cause was resumed.

After the arguments of counsel the court charged the jury in writing, and they were placed in charge of an officer duly sworn for that purpose, and retired to consider of their verdict, and at this time by stipulation of counsel, it was ordered that any bill of exception herein might be presented to the court and be filed during this term of court, and the jury regularly impaneled herein returned into court, and, being duly polled, answer to their names and ask for further instructions, and after being duly instructed by the court they were placed in charge of an officer duly sworn for that
475 purpose, and again retired to consider of their verdict, and afterwards the jury returned into court with a verdict signed by their foreman, and, being called, answer to their names and say:

In the District Court of the First Judicial District of the Territory of Idaho in and for Shoshone County.

THE STEMWINDER MINING COMPANY, a Corporation, Plaintiff,
vs.
THE EMMA AND LAST CHANCE CON. MIN. CO. ET AL.

We, the jury in the above-entitled cause, find the right of possession to the area of ground in conflict in this action to belong to the defendants.

WILLIAM A. PARKER, *Foreman.*

The jury were then excused from the further consideration of this case.

And on motion of the plaintiff the court granted a stay of proceedings for ten days.

And afterwards, and on the 5th day of October, A. D. 1888, a decree herein was filed, which is in the words and figures as follows, to wit:

476 (Title of Court and Cause.)

This cause came on regularly for trial. The said plaintiff appeared by its attorneys, Albert Hagan and Albert Allen, Esquires, and the defendants by Woods & Heyburn, Esquires, its attorneys. A jury of twelve persons was regularly impaneled and sworn to try the said action; whereupon witnesses upon the part of the plaintiff and defendant were sworn and examined, and, after hearing the evidence and arguments of counsel and the instruction of the court, the jury retired to consider of their verdict, and subsequently returned into court with a verdict, signed by the foreman, and, being called, answer to their names and say:

"We, the jury in the above-entitled cause, find the right of possession to the area of ground in conflict in this action to belong to the defendant.

"WILLIAM PARKER, *Foreman.*"

Wherefore, by reason of the law and by virtue of the premises aforesaid, it is ordered, adjudged, and decreed that the said defendant, The Emma, Last Chance, Consolidated Mining Company, have the right of possession of the mining ground in controversy between said plaintiff and defendant and in said complaint described as follows, to wit: Beginning at a point, being corner No. 3 of the
477 official survey of the Emma Lode claim, as the same was surveyed and marked upon the ground in the making of the official survey for a United States patent; thence north 82 degrees 23 minutes east, 82.4 feet to a point on the north side line of the said Emma Lode claim as surveyed for patent; thence south 71 degrees 50 minutes east, 534.9 feet to a point; thence south 11 degrees 58 minutes east, 59.6 feet to a point on the south side line of the said Emma Lode claim, said point being south 80 degrees 40 minutes east, 612.8 feet from corner No. 2 of said official survey of the Emma Lode claim; thence along the south side line of said Emma Lode claim north 80 degrees 40 minutes west, 612.8 feet to corner No. 2 of the official survey of the said Emma Lode claim; thence north 1 degree east 114 feet to the place of beginning, and containing an area of 1.38 acres of land, and that the same be adjudged and decreed to be a part of the said Emma Lode claim, as the same was located and claimed by Jno. Flaherty, J. L. Smith, M. Carlin, and John M. Burke on the 17th day of September, 1885, and that the right of possession to all of said Emma Lode claim as surveyed for a patent and described in the application for patent belongs to the defendant in this action, and that the defendant have and recover of and from said plaintiff its costs and disbursements in this action, amounting to the sum of $1,141.30.

JOHN L. LOGAN, *Judge.*

A true copy.

478 Attest my hand and the seal of said district court this 5th day of October, A. D. 1888.

F. H. GRIERSON, *Clerk.*
By BARRY N. HILLARD, *Deputy.*

(Endorsed:) No. 282. In district court, Shoshone county, Idaho Ter. The Stemwinder M/g. Co. *vs.* The Emma and Last Chance Con. M/g. Co. *et al.* Decree. Filed October 5th, A. D. 1888. F. H. Grierson, clerk, by Barry N. Hillard, deputy.

And afterward, and on October 5th, 1888, the certificate to the judgment-roll was filed herein, which is in words and figures as follows, to wit:

(Title of Court and Cause.)

I, the undersigned, clerk of the district court of the first judicial district of said Territory, in and for said county, do hereby certify the foregoing to be a true copy of the judgment entered in the above-entitled action and recorded in Judgment Book "B" of said court, on page 47, and I further certify that the foregoing papers hereto annexed constitute the judgment-roll in said action.

Witness my hand and the seal of the district court this 5th day of October, 1888.

[SEAL.] F. H. GRIERSON, *Clerk*,
By BARRY N. HILLARD, *Deputy*.

479 (Endorsed:) No. 282. District court of the first judicial district, county of Shoshone. The Stemwinder Mining Company, plaintiff, *vs.* The Emma and Last Chance Con. Mng. Co. *et al.*, defendants. Judgment-roll. Filed October 5th, A. D. 1888. F. H. Grierson, clerk, by Barry N. Hillard, deputy clerk. (End of folio 47.)

In the Supreme Court of the Territory of Idaho, January Term, A. D. 1889.

THE STEMWINDER MINING COMPANY, Plaintiff and Appellant,
vs.
THE EMMA AND LAST CHANCE CONSOLIDATED MINING COMPANY *et al.*, Defendants and Respondents.

Opinion.

WEIR, *C. J.*:

This is an appeal from a judgment in favor of the defendant and against the plaintiff entered upon the verdict of a jury, and also from an order denying a motion for a new trial. The cause of action arose in the county of Shoshone, in the first district. The complaint substantially alleges that the plaintiff is a corporation,
480 duly organized and existing under the laws of the State of Oregon, and that the defendant is likewise a corporation organized and existing under and by virtue of the laws of the same State; that since the 11th day of March, 1887, plaintiff has been, and is now, the owner of the premises in dispute, subject only to the paramount title of the United States, and is entitled to the possession of a certain mine and mining claim called the "Stemwinder mining claim," and then proceeds to set out the description of the claims of the plaintiff and of the defendant, and

that the grantors of the defendant, on the 6th day of March, 1887, filed with the register of the land office an application for a patent, and in such application wrongfully and without right set up title to certain premises which the plaintiff claims is the property of itself, and that the suit is brought for the purpose of ascertaining the ownership of the said alleged tract of land in dispute; and then prays judgment against the defendant, first, that the plaintiff is the owner of and lawfully in and entitled to the possession of the premises described, the area in conflict between the Stemwinder mining claim and the alleged Emma mining claim and the lode therein, and quieting and confirming plaintiff's title thereto and the possession thereof, and that the defendants have no title to or right of possession of said conflicting area or the lode therein, or any part thereof. The defendants demurred to the complaint in the action, which demurrer was overruled by the court, and the defendant was given five days in which to prepare and serve an answer.

481 The answer, though very long, contains substantially a general denial, and sets up title or claim to the premises in dispute by reason of a location thereof by certain parties and the transfer thereof to the defendant, and that such location was prior to the location made by plaintiff's grantors; and further claims that the location under which the plaintiff claims was never at any time located, staked, marked, and defined in accordance with the requirements of law, if at all, until long subsequent to the aforesaid location of the Emma mining claim by the locators thereof, and that the plaintiff is not, nor has it ever been, in possession of the area so in conflict as aforesaid. Upon these issues the case came to trial. The plaintiff offered such evidence as it saw fit as to the location of its claim and the defendant did the same.

Strictly, there was but one issue in the case, and that was, which of the parties made the first valid location of the area in dispute. The evidence on that point was conflicting, and presented a question of fact for the jury. Upon this question the jury rendered a verdict in favor of the defendant and against the plaintiff. Whereupon the plaintiff made a motion for a new trial upon the proper papers, which motion was denied.

The questions presented for our consideration are the alleged errors made by the court in the admission of certain testimony, and as to the charge made by the court to the jury and its refusal to charge certain requests made by the plaintiff.

482 The only exception taken to the admission of alleged improper evidence by the court was in regard to a compromise monument erected along the alleged line between the claim of plaintiff and defendant. The defendant offered evidence to show that the compromise point was erected by agreement; not for the purpose of establishing a location, but for the purpose of showing where the location was, as it was then understood by all the parties. This evidence the court, upon objection by the plaintiff, excluded; but it appears that a map used for other purposes on the trial contained upon its face the compromise monument, and that it was frequently referred to as the compromise monument, and as so re-

ferred to the question was really before the jury. It appears that the court permitted evidence by the engineer who surveyed the defendant's claim in December, 1886, in regard to having this compromise monument pointed out to him by the parties then claiming the ground, as the compromise monument agreed upon by such parties themselves. We are by no means prepared to say that the evidence as offered by the defendant was not admissible. Such evidence was not within the rule laid down by the authorities cited by the plaintiff, and did not seek in any manner to establish the location of a mining claim by parol, but, on the contrary, really sought to show that the claims as located were in some dispute, and the parties ran the lines by agreement so as not to interfere with each other, and placed this monument only for the purpose
483 of showing that they had done so. But even though this was error, the testimony admitted by the court was clearly right and proper. The engineer, in making the survey, referred to this compromise monument only to show how and in what manner he had made the survey. We see nothing in the admission of this testimony which was improper or which in any manner tended to prejudice the rights of the plaintiff.

We shall not notice the many exceptions taken by the plaintiff in regard to the charge of the court and the refusal of the court to make certain charges at the request of the plaintiff. Most of them are utterly without merit, for the reason that the court had already fully charged upon the propositions requested, and also for the reason that many of the requests practically called for a decision upon the same proposition of law rejected by the court, couched in different language. The charge of the court as delivered was very full and complete, and really presented to the jury every question necessary for their consideration, and the many requests made by the plaintiff were but a repetition of the charge already given. We shall notice, however, three of the plaintiff's exceptions: First, those which relate to the defendant's location being in excess of the quantity of land allowed by law; second, the right of a corporation to locate a mining claim; and third, the question raised by the plaintiff as to what distance the plaintiff was entitled to from the middle of the vein or point of discovery.

484 It is perfectly clear in our mind that the location of the defendant was not wholly void, for the reason that the defendant's grantors did, in marking the boundaries of the location, place their stakes more than 1,500 feet in length and 600 in width. Under the evidence in this case no fraud is alleged or claimed. No rights of third parties were infringed upon, and the evidence is conclusive that the location was made by measurements by the eye and by stepping off the distances; and it also appears that in December, 1886, the alleged location was surveyed and the lines were drawn in such manner that the amount of the claim was not in excess of the amount allowed by law. This occurred prior to the plaintiff making its amended location, and under the facts of this case there can be no question that the location or claim of the defendant was void only as to the excess. The authorities would seem to be conclusive

upon that point. (Atkins *v.* Hendree, 1 Idaho, 95; Mining Co. *v.* Tarbett, 98 U. S., 464; Richmond Mining Co. *v.* Rose, 114 U. S., 576.)

It appears conclusively from the location notice placed upon the ground by the defendant's grantors at the time of location that they only claimed 1,500 feet along the lode or vein, and 300 feet on each side, and no more. There is nothing in the contention that the decision of the court in the last case does not apply in principle to the present case. It is true that that case was decided under the act of 1866, and the present case arises under the act of 1872; yet the principle is the same. In that the court says:

485 We hardly think it needs discussion to decide that the inclusion of a larger number of linear feet than two hundred renders a location, otherwise valid, totally void. This may occur, and often must occur, by accident of the surveyor, or other innocent mistake, where there exists no intention to claim more than two hundred feet. Must the whole claim be made void by this mistake, which may injure no one, and was without any design to violate the law? We can see no reason in justice or in nature of the transaction why the excess may not be rejected and the claim be held good for the remainder unless it interferes with the rights previously acquired.

We do not, therefore, think it necessary to further consider this point, except to say that we find no error in the refusal of the court to charge on the subject as was requested by the plaintiff. * * * Moreover, there was no merit in the plaintiff's requests. The location of the plaintiff as proven showed the same state of facts in relation to itself as did the defendant's, and the court would not have been justified under the evidence in charging the jury that the defendant's location only would be void.

The defendant requested the court to charge the jury that the plaintiff was a corporation organized under the laws of the State of Oregon, and that no such corporation is entitled to the privilege of making a mineral location of lands belonging to the United States. This the court charged. Without deciding whether this was error

486 or not, we can safely say that it was not such an error in this case as would justify the court in reversing the judgment. There was no evidence that the corporation made the location. On the contrary, the evidence was conclusive that the corporation did not make the location, and the charge, even though error, could not in any way have injured the plaintiff. Besides this, the defendant claimed was in precisely the same condition, and the evidence was conclusive there that the defendant did not make the location, but stood in the same position that the plaintiff did, namely, it had purchased its claim from citizens who had made locations. The charge of the court being perfectly clear as to the real facts of the case, and the case being properly submitted to the jury, to charge as the court did, under all the circumstances, was not in error, as such charge could not in any manner have injured any one. We therefore conclude that as to this point there was no error to justify us in reversing the judgment.

As to the third and last point which the plaintiff raises, we think there is nothing whatever in it, and that the charge as delivered by the court was perfectly correct under the facts in every respect. Under the circumstances the court would have been perfectly justified in refusing to consider the requests made by the plaintiff at that time. But even as delivered and refused we find no error. The court stated to the jury that at the time of the location measurements must be from the point of discovery—the middle of
487 the point of discovery—unless there is evidence before you that the vein has been actually established and run. But if the evidence is simply that there was a point of discovery, then the only knowledge you can have of the vein is that part which crops out at the point of discovery, and the parties must be entitled to 300 feet on each side of the middle of the vein at the point of discovery as they had so located this claim. It must not exceed 300 feet—that is, they are entitled to 300 feet on each side of the vein. This we think was proper, and was the only charge which could have been given to the jury under the state of the evidence.

The plaintiff seems to lay great stress on the fact that the court refused to charge the 22d proposition required by it. In answer to this claim it is only necessary to say that from an examination of the record it wi l be found that the court charged the proposition except as to two or three lines which should not have been changed. At the conclusion of the charge the court verbally charged the jury as follows: That there is really but one question in this case, and that is, Who first made a valid location on this ground? That is really the whole question. Now, to determine that point you must go into all the evidence you have heard, reconcile it, if you can, and ascertain, if you can, who, in your judgment, made a valid location upon that ground. If you find that the plaintiff made the first valid location, the plaintiff is prior in point of time, and, whatever may be the facts in this case, the plaintiff is entitled to a verdict at your hands. If you find, however, that the defend-
488 ant made the first valid location of the ground in dispute, then the defendant is entitled to a verdict at your hands. I state this to you so as to simplify the case and bring it down to the direct point in issue.

Under the pleadings and the evidence this charge was perfectly proper, and the jury could not have been mistaken as to what was the real issue in the case. The evidence was conflicting, but fully justified the verdict of the jury. The contention of the plaintiff that because the location notice, as recorded by the defendant, described the defendant's claim as adjoining the Stemwinder the defendant is estopped from claiming that its location is prior in point of time to plaintiff's, under the evidence and the explanation which was given of that statement is utterly without merit.

We think there is no error in the record which would justify this court in reversing the judgment. The judgment is therefore affirmed, with costs.

Judgment affirmed.

TERRITORY OF IDAHO, }
County of Ada, } ss:

I, S. H. Hays, clerk of the supreme court of the Territory of Idaho, do hereby certify the foregoing seven pages is a full, true, and correct copy of the opinion in the case of The Stemwinder Mining Claim *v.* The Emma and Last Chance Consolidated
489 Mining Company, John M. Burke, Michael Flaherty, Mike Carlin, and Louis Goldsmith, as rendered and on file in said court and in my custody.

[Supreme Court Seal, Idaho Territory.]

S. H. HAYS,
Clerk of the Supreme Court of Idaho Territory.

(The remainder of this Exhibit "D," being the decision of the Supreme Court of the United States in said case, was not handed to the reporter; hence the same is not incorporated in this record.)

DEFENDANT'S EXHIBIT "I"

(Is a map which could not be conveniently placed in this record.)

DEFENDANT'S EXHIBIT 2.

Amended Notice of Location of the Stemwinder Claim.

Notice is hereby given that the "Stemwinder Mining Company," a corporation duly organized and existing under the laws of the State of Oregon, by and through its president, Van B. De Lashmutt, and its secretary, J. G. Morland, who are duly authorized herein, hereby files this its amended notice of location of the Stemwinder mining claim, for the following reasons and following purposes, to wit: That said mining claim was duly located on the 17th
490 day of Sept., 1885, by S. R. Devine who was a citizen of the United States, over the age of 21 years, and notice thereof was posted on the claim and recorded in the records of Shoshone county, Idaho Territory, in vol. C, of Quartz Locations, page 318, on the 26th day of Sept., 1885, to which records reference is hereby had and made a part of this amended location, and as a basis thereof and thereafter said locators, by conveyance duly made and recorded, sold the same, and the said company by divers mesne conveyance- has become, and is now, the owner of said mining claim, and is in the possession thereof, and owns all the right, title, and interest of said locator therein formerly owned and held by them. That since said original location was made the true course, position, and the strike of the vein so originally located marked out, and defined as the Stemwinder vein or lode, has been demonstrated, and determined and within the lines as originally staked and located herein; and by survey it has also been demonstrated that said locators staked out on each side of said vein, ground in excess of 300 feet on each side of said vein, and the object of this amended notice is to conform to the laws relating to mining claims, both

national and local, and to mark and define and record the same to the extent and with the boundaries hereinafter set forth, the same being within the boundaries so located, marked, and staked in the original location hereof, and not otherwise; therefore, the said The Stemwinder Mining Company, by and through its said officers
491 duly authorized, hereby give notice that it hereby locates the vein and lode so discovered originally by way of amended location for the purpose aforesaid, and hereby claim the vein within the limits and to the extent as follows, to wit: Beginning at center of southeasterly end of claim, at a post upon which amended location notice is posted; thence north 69 degrees 40 minutes west, 356.85 feet to southwest corner, whence a prominent peak bears south 8 degrees 22 minutes east; another prominent peak bears north 84 degrees 35 minutes east, northwest corner; Bunker Hill lode bears north 69 degrees 40 minutes west, 207.8 feet; thence north 12 de-rees 28 minutes west, 619.6 feet to northwest corner; thence south 69 degrees 40 minutes east, 713 7 feet to the northeast corner; thence south 12 degrees 28 minutes east, 619.6 feet to the southeast corner; thence north 69 degrees 40 minutes west, 356.85 feet to place of beginning, situate about one-half mile southwesterly from town of Wardner, on easterly hillside, in Yreka mining district, county of Shoshone, and Territory of Idaho, and that said company intends to hold and work said above-described mining claim as provided by the local laws and customs and the mining laws, both local and national.

It is further intended herein not to abandon in any manner
492 or by implication any rights, privileges, property, possession, or title, derived, originated, owned, or held under the original location hereof; but that the purpose hereof is to more particularly mark, locate, define, and describe the ground, vein, and premises held by said company, without waiving any rights under said original location, all of which the said company, as the legal successor in interest and title and possession, derived from said original locator.

Original location made Sept. 17th, 1885, and recorded Sept. 26th, 1885. Amended location made May 23, 1887.

THE STEMWINDER MINING COMPANY,
By VAN B. DE LASHMUTT,
President of said Company.

Attest: J. C. MORELAND,
Secretary of said Company and Seal Thereof. [SEAL.]

TERRITORY OF IDAHO, } ss:
County of Shoshone, }

Van B. De Lashmutt, being first duly sworn, deposes and says that the Stemwinder Mining Company is a corporation duly organized and existing under the laws of the State of Oregon, and is the owner of the Stemwinder mining claim, and in the possession
493 thereof and working the same. That affiant is the duly authorized and acting president of said company, and makes this

affidavit for and on behalf of said company. That affiant is acquainted with the mining ground described in the amended notice of location herewith, called the Stemwinder mining claim, ledge, or lode, and that the ground and claim therein described has not, nor has any part thereof, to the best of my knowledge and belief, been heretofore located according to the laws of the United States and of this Territory, or if so located, that the same has been abandoned or forfeited by reason of the failure of such former locators to comply, in respect thereto, with the requirements of said laws. That this notice is simply amendatory of the original location hereof, and intended to fully comply with all of said laws, waiving no rights under the original location.

VAN B. DE LASHMUTT.

Subscribed and sworn to before me May 31st, 1887.

[SEAL.] M. C. ATHEY,
Notary Public in and for Shoshone County, Idaho Territory.

Recorded at the request of Chas. Hussey, June 3d, 1887, at 11 o'clock a. m.

THOS. E. McLELLAND,
County Recorder,
By M. J. SWEENY, *Deputy.*

494 STATE OF IDAHO,
County of Shoshone, } ss:

I, Barry N. Hillard, county recorder in and for Shoshone county in the State of Idaho, do hereby certify that the above and foregoing copy of the record of the amended location notice of the Stemwinder Lode claim has been by me compared with the original, and that the same is a true and correct transcript therefrom and of the whole thereof, as the same appears of record in Book "F" of Quartz Locations, at page 159 thereof, records of Shoshone county, Idaho, in my office and in my custody.

Witness my hand and official seal this 27th day of December, A. D. 1895.

[SEAL.]

BARRY N. HILLARD,
County Recorder,
By L. A. DOHERTY, *Deputy.*

(Endorsed:) Certified copy of amended location "Stemwinder lode."

DEFENDANTS' EXHIBIT 3.

Notice of Quartz Location.

495 That the undersigned citizens of the United States claim, by right of location and discovery, 1,500 feet on this lead or vein or mineral deposit, together with all dips, spurs, angles, variations, etc., and 300 feet on each side of the center of the vein, and all mineral contained in these boundaries 600 feet wide and

1,500 feet long; we claim 850 feet in an easterly, 650 feet in a westerly, direction from discovery, said claim is situated on the west side of Milo creek, about ½ mile north of the forks and about 2 miles from the junction of Milo creek with the South fork of the Cœur d'Alene river, and about 2½ miles southeasterly from Jackass Prairie; Yreka min. dis. Shoshone county, Idaho Ter'y, and is legally marked by stakes and blazes, by 3 stakes at the east end and 3 stakes at the west end, and notice at discovery; claim to be known as the Stemwinder.

Located Sept. 17, A. D. 1885.

Locator, S. R. DIVINE.

Witness:
C. E. TYLER.

TERRITORY OF IDAHO, } ss:
County of Shoshone, }

I, S. R. Divine, do solemnly swear that I am acquainted with the mining ground described in the notice of location herewith, called the Stemwinder ledge, lode, or claim, and that the ground and claim therein described, or any part thereof, has not, to the
496 best of my knowledge and belief, been heretofore located according to the laws of the United States and of this Territory, or, if so located, that the same has been abandoned or forfeited by reason of the failure of such former locators to comply, in respect thereto, with the requirements of said laws.

S. R. DIVINE.

Subscribed and sworn to before me this 21st day of Sept., 1885.

J. C. COLWELL,
Deputy Mineral Recorder, Yreka District,
Shoshone County, Idaho Territory.

Filed for record September 21st, 1885, at 3.30 p. m., in the mining records office in Yreka district, Shoshone county, Idaho.

J. C. COLWELL,
Deputy Recorder.

Filed for record in the office of county recorder, Sept. 26th, 1885, at 6 p. m., at the request of J. C. Colwell.

THOS. E. McLELLAND,
County Recorder.

497 COUNTY OF SHOSHONE, } ss:
State of Idaho, }

I, Barry N. Hillard, county recorder in and for said county and State, do hereby certify that the above and foregoing copy of the record of locations of the Stemwinder lode has been by me compared with the original, and that the same is a true and correct transcript therefrom, and of the whole thereof, as the same appears of record in Book "C" of Quartz Locations, at page 318 thereof, records of Shoshone county, Idaho, in my office and in my custody.

Witness my hand and official seal this the 27th day of December, A. D. 1895.

[SEAL.]

BARRY N. HILLARD
County Recorder,
By L. A. DOHERTY, *Deputy.*

(Endorsed:) Certified copy of location notice of "Stemwinder" Lode claim.

STATE OF IDAHO
County of Latah, } ss:

I, J. L. Rivers, hereby certify that I acted as a shorthand
498 reporter at the trial of the within cause, and reduced to shorthand writing the oral proceedings taken and had therein, as was required, and that the within and foregoing is a full, true, and correct transcript of said proceedings so reported by me; together with full, true, and correct copies of the exhibits introduced at said trial, exclusive of Plaintiff's Exhibit "A," and the different maps and plat which could not be conveniently placed in this record.

Witness my hand this 10th day of June, A. D. 1897.

J. L. RIVERS.

I hereby certify that the foregoing is a correct transcript of the testimony and proceedings had at the trial of the above-entitled cause. Dated this 19th day of October, 1897.

JAS. H. BEATTY, *Judge.*

Filed October 19, 1897.

A. L. RICHARDSON, *Clerk.*

Record Entries.

At a stated term of the circuit court of the United States, in and for the northern division of the district of Idaho, held at Moscow, Idaho, on the 19th day of October, 1897.

Present: Hon. Jas. H. Beatty, judge.

499 ROYAL J. RUTTER and F. W. BRADLEY
vs.
THE SHOSHONE MINING COMPANY. } No. 81.

The defendant's motion for a rehearing in this cause having been heretofore submitted to the court, and the court being fully advised in the premises, ordered that said motion for a rehearing be, and the same is hereby, denied.

THE SHOSHONE MINING COMPANY
vs.
ROYAL J. RUTTER and F. W. BRADLEY. } No. 102.

The plaintiff's motion for a rehearing in this cause having been heretofore submitted to the court, and the court being fully advised in the premises, ordered that said motion for a rehearing be, and the same is hereby, denied.

500 ROYAL J. RUTTER and F. W. BRADLEY
vs.
THE SHOSHONE MINING COMPANY. } No. 81.

By agreement of counsel for the respective parties herein, in open court, it is ordered that this cause and No. 102, The Shoshone Mining Company *v.* Royal J. Rutter and F. W. Bradley, be consolidated for the purpose of an appeal.

That one appeal shall carry both cases, and one bond only on appeal shall be required, and the record of both cases shall be printed together as one record and shall be briefed together.

ROYAL J. RUTTER and F. W. BRADLEY
vs.
THE SHOSHONE MINING COMPANY. } No. 81.

Now came the defendant herein, by its attorney, W. B. Heyburn, Esqr., and gave notice in open court of an appeal herein to the U. S. circuit court of appeals for the ninth circuit, Jno. R.
501 McBride, Esqr., attorney for plaintiffs, being present; thereupon the court ordered that said appeal be, and is hereby, allowed, and the bond upon said appeal is hereby fixed at the sum of $500.00.

THE SHOSHONE MINING COMPANY
vs.
ROYAL J. RUTTER and F. W. BRADLEY. } No. 102.

Now came the plaintiff herein by its attorney, W. B. Heyburn, Esqr., and gave notice in open court of an appeal herein to the U. S. circuit court of appeals for the ninth circuit, Jno. R. McBride, Esqr., attorney for defendants, being present; thereupon the court ordered that said appeal be, and is hereby, allowed.

502 In the Circuit Court of the United States in and for the District of Idaho, Northern Division. In Equity.

ROYAL J. RUTTER and F. W. BRADLEY, Complainants,
vs.
THE SHOSHONE MINING COMPANY, a Corporation, Defendant. } No. 81.

THE SHOSHONE MINING COMPANY, a Corporation, Complainants,
vs.
ROYAL J. RUTTER and F. W. BRADLEY, Defendants. } No. 102.

Bond on Appeal.

Know all men by these presents, that we, The Shoshone Mining Company, as principal, and F. Lewis Clark and F. J. Kilner,
503 as sureties, are held and firmly bound unto Royal J. Rutter and F. W. Bradley, in the full sum of five hundred dollars, to be paid to the said Royal J. Rutter and F. W. Bradley, their cer-

tain attorneys, executors, administrators, or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 26th day of October, in the year of our Lord one thousand eight hundred and ninety-seven.

Whereas, lately at a circuit court of the United States for the district of Idaho, northern division, in an suit depending in said court between Royal J. Rutter and F. W. Bradley, complainants, and The Shoshone Mining Company, defendant, and also in a suit depending in said court between the said Shoshone Mining Company, as complainants, and the said Royal J. Rutter and F. W. Bradley, as defendants, a decree was rendered against the said Shoshone Mining Company in each of said cases, and the said Shoshone Mining Company having appealed therefrom, and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suits, and a citation directed to the said Royal J. Rutter and F. W. Bradley, citing and admonishing them to be and appear at a session of the United States circuit court of appeals, for the ninth circuit, to be holden at the city of San Francisco in said circuit on the — day of —— next.

504 Now, the condition of the above obligation is such, that if the said Shoshone Mining Company shall prosecute said appeal to effect, and answer all damages and costs if it fail to make the said plea good, then the above obligation to be void, else to remain in full force and virtue.

SHOSHONE MINING COMPANY,
By F. LEWIS CLARK, [SEAL.]
Vice-President.
F. LEWIS CLARK. [SEAL.]
F. J. KILNER. [SEAL.]

Sealed and delivered in the presence of:
GEO. P. CRAGIN.

Attest:
[SEAL.] W. E. GOODSPEED, *Secretary.*

Approved by—
JAS. H. BEATTY, *Judge.*

UNITED STATES OF AMERICA,
State of Washington, County of Spokane, } ss:

F. Lewis Clark and F. J. Kilner, being first duly sworn, each for himself, deposes and says that he is a citizen and householder
505 in Spokane, State of Washington, and is worth the sum of five hundred dollars, exclusive of property exempt from execution, and over and above all his just debts and liabilities.

F. LEWIS CLARK.
F. J. KILNER.

Subscribed and sworn to before me this 26th day of October, A. D. 1897.

[SEAL.] GEO. D. CRAGIN,
Notary Public in and for the County of Spokane, in the State of Washington, Residing at Spokane, Wash.

(Endorsed:) No. 81. In the United States circuit court, ninth judicial circuit, in and for the district of Idaho, northern division. Royal J. Rutter and F. W. Bradley, comp., *vs.* Shoshone Mining Co., def't. Shoshone Mining Co., comp., *vs.* Royal J. Rutter and F. W. Bradley. Bond on appeal. Original. Filed Nov. 10, 1897. A. L. Richardson, clerk. W. B. Heyburn, counsel for Shoshone Mining Co.

506 In the United States Circuit Court of Appeals for the Ninth Circuit. In Equity.

ROYAL J. RUTTER and F. W. BRADLEY, Complainants,
vs.
THE SHOSHONE MINING COMPANY, a Corporation, Defendant. } No. 81.

THE SHOSHONE MINING COMPANY, a Corporation, Complainant,
vs.
ROYAL J. RUTTER and F. W. BRADLEY, Defendants. } No. 102.

Citation.

THE UNITED STATES OF AMERICA, *Ninth Judicial Circuit,* } *ss:*

To Royal J. Rutter and F. W. Bradley, Greeting:

You are hereby cited and admonished to be and appear at
507 a session of the United States circuit court of appeals for the ninth circuit, to be holden at the city of San Francisco in said circuit on the 9th day of December, next, pursuant to an appeal allowed and on file in the clerk's office of the circuit court of the United States for the district of Idaho, northern division, wherein The Shoshone Mining Company is appellant, and you are respondents, in the consolidated causes of Royal J. Rutter and F. W. Bradley, complainants, *v.* The Shoshone Mining Company, a corporation, defendant, in equity No. 81 and The Shoshone Mining Company, a corporation, complainant, and Royal J. Rutter and F. W. Bradley, defendants, in equity, No. 102, to show cause, if any there be, why the decree rendered against the said appellant, in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 10th day of November, in the year of our Lord one thousand eight hundred and ninety-seven, and of the Inde-

pendence of the United States of America the one hundred and twenty-first.

JAS. H. BEATTY, *Judge.*

Service of copy of this citation received this 12th day of November, 1897.

JNO. R. McBRIDE,
Attorney for Rutter and Bradley.

508 (Endorsed:) Filed Nov. 13th, 1897. A. L. Richardson, clerk. W. B. Heyburn, counsel for Shoshone Mining Co.

Order to Transmit Record.

Whereupon it is ordered that a transcript of the record, papers, and proceedings in the aforesaid consolidated causes, and all things thereunto relating, be transmitted to the United States circuit court of appeals for the ninth judicial circuit at San Francisco, California, with all convenient speed.

Witness my hand and the seal of said court this 4th day of December, 1897.

A. L. RICHARDSON, *Clerk.*

509 In the Circuit Court of the United States in and for the District of Idaho, Northern Division.

ROYAL J. RUTTER and F. W. BRADLEY, Complainants,
vs.
THE SHOSHONE MINING COMPANY, a Corporation, Defendant. } No. 81.

THE SHOSHONE MINING COMPANY, a Corporation, Complainant,
vs.
ROYAL J. RUTTER and F. W. BRADLEY, Defendants. } No. 102.

Clerk's Certificate to Transcript.

510 I, A. L. Richardson, clerk of the circuit court of the United States in and for the district of Idaho, do hereby certify the foregoing transcript of pages, numbered from 1 to 408, inclusive, to be a full, true and correct copy of the pleadings and proceedings in the above-entitled cause, and that the same together constitute the transcript of the record herein, upon appeal to the United States circuit court of appeals for the ninth circuit. I further certify that the cost of said record, amounting to $309.30, has been paid by said appellant.

Witness my hand and the seal of said circuit court, affixed at Boise, Idaho, this 4th day of December, 1897.

[SEAL.] A. L. RICHARDSON, *Clerk.*

(Endorsed:) No. 413. In the United States circuit court of appeals for the ninth circuit. The Shoshone Mining Company, appellant, *v.* Royal J. Rutter and F. W. Bradley, appellees. Transcript of record. Appeal from the circuit court of the United States for the district of Idaho, northern division. Filed December 13, 1897. F. D. Monckton, clerk.

511 United States Circuit Court of Appeals for the Ninth Circuit.

THE SHOSHONE MINING COMPANY, Appellant,
v.
ROYAL J. RUTTER and F. W. BRADLEY, Appellees. } No. 413.

Appeal from the circuit court of the United States for the district of Idaho, northern division.

W. B. Heyburn for the appellant.
John R. McBride and Garber & Garber for the appellees.

Before Gilbert and Ross, circuit judges, and Hawley, district judge.

HAWLEY, district judge, delivered the opinion of the court:

This is a suit is equity, brought under the provisions of section 2326 of the Revised Statutes, to determine the rights of the respective parties to certain mining ground situated in Yreka mining district, Shoshone county, Idaho. On August 21, 1895, appellant applied for a patent to the Shoshone Lode claim. Appellees thereafter filed their protest and an adverse claim against said application, and in due time commenced this suit in support of their claim in the circuit court of the United States for the district of Idaho. Both parties are citizens and residents of the State of Idaho. A demurrer was interposed to the complaint and overruled by the court. The cause thereafter came to issue, was tried upon its merits, and resulted in a decree in favor of the appellees. The questions presented by the demurrer will be first considered.

512 1. Appellant claims that the circuit court had no jurisdiction to try the case. Does the complaint in this case show upon its face that the suit is one arising under the laws of the United States? This question, under the repeated decisions of the courts in this and other circuits, has been, so far as we are advised, universally answered in the affirmative. Different grounds have been stated and different reasons assigned by the various courts, but the conclusion has always been the same, that the circuit courts of the United States have jurisdiction to try all cases instituted under and by virtue of the provisions of section 2326 of the Revised Statutes, independent of the question of citizenship of the respective parties.

Frank *v.* Larimer, 8 Fed., 724.
Cheesman *v.* Shreve, 37 Fed., 36.
Doe *v.* Waterloo M. Co., 43 Fed., 219.
Strasburger *v.* Beecher, 44 Fed., 209, 213.
Burke *v.* Bunker Hill & S. M. Co., 46 Fed., 644, 646.
Wise *v.* Nixon, 76 Fed., 3, 6.

But it is argued by appellant's counsel that all of these decisions have been virtually overruled by the decision of the Supreme Court in the case of Bushnell *v.* Crooke M. Co., 148 U. S., 682. As we understand the decision in that case, no such question as is here presented was there raised, discussed, or decided. That action was brought in the State court, tried in the State court, and an appeal was taken to the supreme court of the State, and, after a petition for rehearing was filed, the losing party for the first time suggested that a Federal question was involved, to wit, a construction of section 2322 of the Revised Statutes. The petition for rehearing being denied, a writ of error was sued out and the case taken to the Supreme Court of the United States. The writ of error was there dismissed upon the ground, to quote the language of
513 the decision: "The attempt to raise for the first time a Federal question in a petition for rehearing, after judgment, even assuming that the petition presented any such question, is clearly too late. It has been repeatedly decided by this court that a Federal question, when suggested for the first time in a petition for rehearing, after judgment, is not properly raised so as to authorize this court to review the decision of the highest court of the State." No question was raised as to the competency of the courts, either national or State, to try a case brought under the provisions of section 2326. The only question at issue there, under the pleadings and at the trial, was as to the true course of the lode or vein. The instructions referred to in the opinion had reference to that question only, which was solely a question of fact, and the court said that no Federal question was involved—that is, that no question was raised which called for any construction of section 2322. The other decisions that we have cited go directly to the point raised in this case. In Burke *v.* Bunker Hill & S. M. Co., 46 Fed., 644, 646, the court said: "It is claimed on one side and denied on the other that this suit, having been brought to determine the title to a mining claim in pursuance to the requirements of section 2326 of the Revised Statutes, as amended in March, 1881 (1 Sup. Rev. St., 609), is, for that reason, a suit arising under the laws of the United States within the meaning of the statute giving jurisdiction on that ground, irrespective of the character of the questions involved in the litigation. It seems to us that all the authorities as they now stand have determined the question in favor of the affirmative of this proposition." In Jackson *v.* Roby, 109 U. S., 440, which was a suit brought in the circuit court of the United
States for the district of Colorado in support of an adverse
514 claim under the provisions of section 2326 of the Revised Statutes, the court disposed of the case upon its merits, and it is certainly fair to assume that it had no doubts as to its jurisdiction in the premises. In Chambers *v.* Harrington, 111 U. S., 350, it was claimed that a judgment rendered in a suit brought under the provisions of section 2326 of the Revised Statutes was not subject to review in the supreme court. The court said: "But it is apparent that the statute requires a judicial proceeding in a competent court. What is a competent court is not specifically stated,

but it undoubtedly means a court of general jurisdiction, whether it be a State court or a Federal court; and as the very essence of the trial is to determine rights by a regular proce lure in such court after the usual methods, which rights are dependent on the laws of the United States, we see no reason why, if the amount in controversy is sufficient in a case tried in a court of the United States or the proper case is made on a writ of error to a State court, the judgment may not be brought to this court for review, as in other similar cases."

The proceedings required to be commenced under the provisions of section 2326 in a court of competent jurisdiction may be brought either in the State or national courts, at law or in equity, as the facts may warrant; but section 2326 does not confer any special jurisdiction on the State courts. When the suits are brought and tried in the State courts they are subject to the provisions of the State statutes in relation to such cases, and the courts proceed in the manner prescribed by such statutes. The proceedings in the national courts are regulated by the provisions of section 2326, as will more fully appear in the consideration of the next question involved
515 herein. In several Pac fic Coast States statutes have been passed for the purpose of supplementing the provisions of section 2326, and the cases when tried in the courts of such States are controlled by such statutes, independent of any other provisions of the State statutes. Rose *v.* Richmond, 17 Nev., 25, 52; 2 Lindley on Mines, sections 754–'5, and authorities there cited. In Steele *v.* Gold Lead M. Co., 18 Nev., 87, the court said: "These actions may be brought by the plaintiff, whether he is in or out of possession of the mining ground in controversy, and the only sensible construction of the law is that each party must prove his claim to the premises in dispute, and that the better claim must prevail." Now, if there were no statute of the State specially providing for the trial of this class of cases it might be that the State courts would not be able, in all cases, to try questions required to be heard and determined by section 2326, as amended; but be that as it may, our conclusion is that upon reason and authority the circuit courts of the United States have jurisdiction to hear and determine the respective rights of the parties in controversies arising under the provisions of section 2326, if the property in controversy exceeds in value the sum of $2,000, independent of the question of the citizenship of the respective parties or of the fact as to whether or not the case presents any Federal question involving the construction of any other provision of the laws of the United States. In other words, that a circuit court of the United States is "a court of competent jurisdiction" to try such cases, within the meaning of those words as used in said statute.

2. The next point raised by the demurrer is "that it appears on the face of the bill that the plaintiff has an adequate remedy
516 at law." The bill, among other things, alleges that the complainants long prior to August 20, 1895, were, "ever since have been, and now are the owners (subject only to the paramount title of the United States) and in the possession of that certain mine

and mining claim containing a lode of rock in place bearing silver, lead, and other valuable minerals and metals, situate in Yreka mining district, Shoshone county, State of Idaho, called the Kirby Fraction lode and mining claim," which is particularly described by metes and bounds; that the defendant, claiming to be the owner of an alleged adjacent mining claim called the "Shoshone mining claim," on or about the — day of August, 1895, wrongfully caused said Shoshone mining claim to be so surveyed as to crop upon and overlap the said Kirby Fraction Lode mining claim and to include a portion thereof, which is particularly described in the bill; that on or about the 24th day of August, 1895, the said defendant applied for a United States patent at the proper land office; "that in and by said application for patent the defendant set up and wrongfully alleged that it was the owner and in possession of the whole of said Shoshone mining claim, inclusive of the premises last above described, and of the lode therein, part of the Kirby Fraction lode and mining claim, and the property and in the possession of the complainants."

The proceeding required, authorized, and directed by section 2326 of the Revised Statutes has no specific relation whatever to the action of ejectment or to any other common-law action. The object of the proceeding is the determination of the contest in the land office, as to which of the parties, if either, is entitled to receive a patent from the Government, a right which arises out of a full compliance with the laws of Congress for the acquisition of a Government patent for mineral lands. The proceedings are purely statutory, and
517 their inception is in the land office, not in the courts where the suit is commenced. As was said in Wolverton *v.* Nichols, 119 U. S., 485, 488, "The proceedings in this case commenced by the assertion of the defendants' claim to have a patent issue to them for the land in controversy. The next step was the filing of an adverse claim by the plaintiffs in the land office, and the present suit is but a continuation of those proceedings prescribed by the laws of the United States to have a determination of the question as to which of the contesting parties is entitled to the patent. The act of Congress requires that the certified copy of the judgment of the court shall be filed in the land office and shall be there conclusive; and we must keep this main purpose of the action in view in any decision made with regard to the rights of the parties." Whatever may be said of the nature and character of these proceedings when tried in the State courts, where the statutes have, as to the forms of action, abolished the distinction which exists in the national courts between law and equity, it must, we think, be conceded that such proceedings are of an equitable nature, and when brought in the national courts are to be tried as equity cases. The mere fact that in certain cases an action at law has been deemed sufficient does not change the equitable character of the suit. The suit is brought for special relief, and the judgment required to be entered is such as a court exercising jurisdiction in equity alone could render. This is clearly shown by the court in Hammer *v.* Garfield M. Co., 130 U. S., 291, 296, where the court, in the course of its opinion

following the views expressed in Basey *v.* Gallagher, 20 Wall., 670, 679, said: "The suitor, whatever relief he may ask, is required to state, in ordinary concise language, the facts of
518 his case upon which he invokes the judgment of the court; but the consideration which the court will give to the questions raised by the pleadings when the case is called for trial or hearing, whether it will submit them to a jury or pass upon them without any such intervention, must depend upon the jurisdiction which is to be exercised. If the remedy sought be a legal one, a jury is essential, unless waived by the stipulation of the parties; but if the remedy sought be equitable the court is not bound to call a jury, and if it does call one it is only for the purpose of enlightening its conscience and not to control its judgment. The decree which it must render upon the law and the facts must proceed from its own judgment respecting them and not from the judgment of others. The court might, therefore, have heard this case and disposed of the issues without the intervention of a jury; but, it having called a jury, the trial was conducted in the same manner as a trial of an issue at law. Such is the practice under the system of procedure in the Territory" (of Montana). The determination of the rights of the parties, as required by section 2326, as we have already said, is not necessarily the subject of a common-law action, and a trial thereof on the equity side of the court is certainly not a violation of the provisions of the Constitution, which declares that the right of trial by jury shall be secured to all and remain inviolate forever. The equity jurisdiction of the United States courts is not controlled by State legislation. In Perego *v.* Dodge, 163 U. S., 160, the court held that the amendatory act of March 3, 1881 (21 Stat., 505), was not intended to require and does not require all suits brought under section 2326 to be actions at law and to be tried by a jury. In the course of the opinion, in reference to sections 2325 and 2326, the court said: "Thus
519 the determination of the right of possession as between the parties is referred to a court of competent jurisdiction, in aid of the land office, but the form of action is not provided for by the statute; and apparently an action at law or a suit in equity would lie, as either might be appropriate under the particular circumstances, an action to recover possession when plaintiff is out of possession, and a suit to quiet title when he is in possession." The courts in this circuit have frequently entertained jurisdiction of suits in equity instituted under the provisions of section 2326. In Doe *v.* Waterloo M. Co., 43 Fed., 219, there is a clear enunciation of the principles applicable to this case, substantially in accord with the views herein stated. That case was affirmed in this court in 70 Fed., 458, 462. In Preston *v.* Hunter, 67 Fed., 996, counsel, being in doubt as to whether the suit should be classed as one in equity or an action at law, sent up two transcripts, one upon appeal, as required in equity suits, the other upon writ of error, as required in actions at law. This court, without any discussion of the question, considered the case as an equity suit. It follows from the views

herein expressed that the court did not err in overruling the demurrer to the bill.

3. This brings us to a consideration of the case upon its merits. It appears from the record that appellees first located a claim on a portion of the ground in dispute under the name of the "Edith" mining claim, and recorded the same; that thereafter, before any right of the appellant was made to the ground, the locators of the "Kirby Fraction" mining claim made a location "on top of the Edith," and also included more ground. These locations were made by the same parties. The "Edith" was located June 10, 1886, embracing 1,200 feet on the lode; the "Kirby" on July 11, 1886, claiming 1,400 feet. Jacob Johns, one
520 of the locators, testified that after the location of the "Edith" he found more ground "and located another claim right over it. It was all our property, anyhow, so we located over it, right over the top of the Edith. The location of the Edith was completed before the Kirby was located. * * * I intended to hold both the Edith and Kirby locations." In the conveyances made by the locators they mentioned the "Edith" as well as the "Kirby" claim. Upon these facts appellant contends that if the "Edith" location was valid, the "Kirby" location is void; that the appellees cannot recover upon the "Edith" title, because they have not set up any title to that claim in their bill; that they cannot recover upon the "Kirby" title without showing an abandonment of the "Edith" location. In considering these questions it must be remembered that the "Kirby" was located long prior to the "Shoshone" claim. The evidence does not show that the ground covered by the "Edith" location was intended to be abandoned, but it does show that the original locator of the "Edith" concluded to change the boundaries by adding more ground, and gave a new name to their claim. The locators had the right to do this, as long as they did not interfere with the rights of other parties. The fact that the "Edith" was mentioned in the conveyances does not prove that the parties relied upon the title under that name. A conveyance of the ground by metes and bounds, by any name of the claim, would be valid and effective. The name is generally used to designate or identify the claim, but it may be designated or identified by the use of one or more than one name, if it is known or called by different names. There is no statute, law, rule, or regulation which prevents locators of mining claims from relocating their own claim and including additional vacant ground, unclaimed by other parties, under a
521 different name and conveying it by the designation of the last name. In Weill *v.* Lucerne M. Co., 11 Nev., 200, 210, where the facts were in some respects similar to the case in hand, there were two locations made by the same parties, known respectively as the "Boston" and the "Lucerne." The "Boston" was located prior and the "Lucerne" subsequent to the location of the "Waller's Defeat," owned by the plaintiff. The question was whether the defendant obtained any title to the "Boston" ground under a deed conveying the same by the name of the "Lucerne

ence to the annual assessment-work done upon the "Kirby" cl
in the years 1895 and 1896 and find no error therein.

6. Another case between the same parties was commenced in
State court, removed to the United States circuit court, and t
tried as an equity suit, and, as it involved the title to the s
mining ground, was consolidated—for the purpose of this appe
with the case above disposed of. In the case brought in the S
court appellant claimed title to the mining ground under
525 "Ibex" location. The facts and circumstances as to th
cation of the "Ibex" claim are substantially the sam
those pertaining to the "Shoshone" claim. Having arrived at
conclusion that the "Kirby" claim was a valid location an
being prior in point of time to the others, it becomes unneces
to notice any of the questions raised concerning the "Shosho
or "Ibex" locations. The other questions are the same in b
cases.

The decree in each case is affirmed with costs.

(Endorsed:) Opinion. Filed May 23, 1898. F. D. Monck
clerk.

526 United States Circuit Court of Appeals for the Ninth Circ

THE SHOSHONE MINING COMPANY, Appellant,
vs.
ROYAL J. RUTTER and F. W. BRADLEY, Appellees. } No. 413.

Appeal from the circuit court of the United States for the distric
Idaho, northern division.

Before Gilbert and Ross, circuit judges, and Hawley, district jud

GILBERT, circuit judge, dissenting:

In dissenting from that portion of the opinion which deals w
the question of the jurisdiction I am guided solely by what I c
ceive to be the purport of the decision of the Supreme Court in
case of Bushnell *v.* Crooke Mining Company, 148 U. S., 682. I
unable to concur in the view that the only point decided in that c
was that the suggestion of a Federal question in a petition for
hearing after judgment comes too late. The jurisdiction of
Supreme Court in that case was invoked upon two grounds: Fi
that a Federal question was presented upon the pleadings in the c
and the instructions to the jury, since it was a case arising un
section 2326 of the Revised Statutes, and, second, that a Fede
question was specially presented in the petition for rehearing wh
was filed in the supreme court of the State of Colorado asserti
rights under section 2322. The first question was inherent in t
case and appeared upon the face of the record. It required no pr
entation by petition or otherwise. It was in passing upon the seco
question that the court ruled that the attempt to raise for the fi

time a Federal question in such a petition after judgment
527 was too late; but in dealing with the other question the court said: "It is plainly manifest that neither the pleadings nor the instructions given and refused present any Federal question, and an examination of the opinion of the Supreme Court affirming the action of the trial court as to instructions given, as well as its refusal to give instructions asked by the defendants below, fails to disclose the presence of any Federal question. It does not appear from the record that any right, privilege, or immunity under the Constitution or laws of the United States was specially set up or claimed by the defendant- below, or that any such right was denied them or was even passed upon by the supreme court of the State, nor does it appear from anything disclosed in the record that the necessary effect in law of the judgment was the denial of any right claimed under the laws of the United States. The decision of the supreme court of Colorado in no way brought into question the validity or even construction of any Federal statute, and it certainly did not deny to the plaintiffs in error any right arising out of the construction of the Federal statutes." In so ruling upon that question the court had under consideration the very question which is before us in the case at bar, namely, whether the fact that a case *arises* under section 2326 presents of itself a question of the construction of a law of Congress. The court expressly held that the pleadings suggested no Federal question. The pleadings in that case contained the necessary averments and issues to determine the rights of the contesting claimants under section 2326. It so distinctly appears from the opinion. In that respect the case is identical with the case before us. In the present case there is no suggestion of a Federal question, unless it be in the fact that the pleadings raise an issue under section 2326. The other questions which the record contains are similar to those which were submitted to the jury in Bushnell *v.* Crooke Mining Company. The language
528 above quoted from the opinion in that case applies with equal propriety to the case at bar. I find no allegation in the bill in the present case which suggests that a question arises under a Federal statute, or that the right of either party to the suit will depend upon the interpretation to be given to such a statute. If there was no Federal question in the case of Bushnell *v.* Crooke Mining Company, there is none in this. The decision in that case and in other recent cases in the Supreme Court have established the doctrine that the United States circuit courts cannot entertain jurisdiction of a cause upon the ground that it presents a question of a Federal nature unless it clearly appears from the averments of the complaint or the declaration that in the progress of the trial and preliminary to an adjudication the right of the one or the other of the parties to the controversy will depend upon the construction to be given by the court to some provision of the Constitution, laws, or treaties of the United States. Metcalf *v.* Watertown, 123 U. S., 586; Colorado Central Mining Co. *v.* Turck, 150 U. S., 138; Tennessee *v.* Union & Planters' Bank, 152 U. S., 454; Chapel *v.* Waterworth, 155 U. S., 102.

Company's claims." The court said: "If the 'Boston' notice and the 'Lucerne' notice were posted upon and claimed the same lode, a conveyance of his interest in the lode necessarily conveyed his interest in both locations, and it was immaterial by what particular name he designated it. Phillpots *v.* Blasdell, 8 Nev., 61."

4. It is next claimed that there was no sufficient discovery made of any mineral lode or vein at the time the "Kirby" claim was located, and that for that reason the "Kirby" location was absolutely void. Upon this point there is some conflict in the evidence, but the weight and preponderance in its entirety clearly shows that at the time the location was made the locators had discovered a vein or seams of rock in place bearing minerals. The discovery was made in running a tunnel where small seams of iron oxide, quartz, and small quantities of carbonate of lead were found two or three inches wide. These indications were of such character as miners in that district would follow in the expectation of finding ore, and such as would justify miners in working a claim for that purpose. The rock in these seams was different from the country rock and was of such character as is designated by the witnesses, who were practical miners, "as a vein containing
522 rock in place bearing minerals." These facts show that the location was made in good faith and not "simply upon a conjectural or imaginary existence of a vein or lode," which cannot be permitted. King *v.* Amy & Silversmith M. Co., 152 U. S., 222, 227. The seams containing mineral-bearing earth and rock, which were discovered before the location was made, were similar in their character to the seams or veins of mineral matter that had induced other miners to locate claims in the same district, which by continued developments thereon had resulted in establishing the fact that the seams, as depth was obtained thereon, were found to be a part of a well-defined lode or vein containing ore of great value. The discovery made at the time of the "Kirby" location was therefore such as to justify a belief as to the existence of such a lode or vein within the limits of the ground located. Erhardt *v.* Boaro, 113 U. S., 528, 536. The subsequent developments made after the claim was located and before the location of the "Shoshone" show more clearly the existence of a lode or vein. We are of opinion that the testimony on behalf of appellee is sufficient to show a compliance with the provisions of section 2320, which requires that there must be a discovery of a vein or lode within the limits of the claim before a valid location thereof can be made. In Book *v.* Justice, 58 Fed., 106, 120, the court in construing this section of the statute said: "The words 'vein or lode' in the last clause of this statute were evidently intended to apply to such 'veins or lodes' as were described in the first section and to have the same meaning, viz., a vein or lode 'of quartz or other rock in place bearing gold, silver,' etc. This statute was intended to be liberal and broad enough to apply to any kind of a lode or vein of quartz or other rock bearing mineral, in whatever kind, character, or formation the
523 mineral might be found. It should be so construed as to protect locators of mining claims, who have discovered rock

in place bearing any of the precious metals named therein, sufficient to justify the locators in expending their time and money in prospecting and developing the ground located. It must be borne in mind that the veins and lodes are not always of the same character. In some mining districts the veins, lodes, and ore deposits are so well and clearly defined as to avoid any questions being raised. In other localities the mineral is found in seams, narrow crevices, cracks, or fissures in the earth, the precise extent and character of which cannot be fully ascertained until expensive explorations are made and the continuity of the ore and existence of the rock in place, bearing mineral, is established. It never was intended that the locator of a mining claim must determine all these facts before he would be entitled under the law to make a valid location. Every vein or lode is liable to have barren spots and narrow places, as well as rich chimneys and pay chutes, or large deposits of valuable ore. When the locator finds rock in place containing mineral, he has made a discovery within the meaning of the statute, whether the rock or earth is rich or poor, whether it assays high or low. It is the finding of the mineral in the rock in place, as distinguished from float rock, that constitutes the discovery and warrants the prospector in making a location of a mining claim." See, also, Migeon *v.* Montana Central Railway Co., 44 U. S. App., 724, 737; McShane *v.* Kenckle, 18 Mon., 208; Bonner *v.* Meikle, 82 Fed., 697, 703. The purpose of the statute in requiring that "no location of a mining claim shall be made until the discovery of a vein or lode within the limits of the claim located" was to prevent frauds upon the Government by persons attempting to
524 acquire patents to land not mineral in its character, but, as was said in Bonner *v.* Meikle, *supra*, "it was never intended that the court should weigh scales to determine the value of mineral found, as between a prior and subsequent locator of a mining claim on the same lode." The location of the "Kirby" was made in 1886. The discovery of mineral then made was sufficient to induce the locators and their grantees to perform the amount of annual labor thereon as required by the mining laws; to expend their time and money in prosecuting the work thereon, in the belief and expectation of finding ore of profitable value therein. The location of the "Shoshone" was not made until 1895. There is no good reason why the owners of the "Kirby" should be deprived of the discoveries made by them in prosecuting the work thereon after the location was made and prior to the time of the location of the "Shoshone" claim. The court did not err in admitting the testimony upon this point.

North Noonday M. Co. *v.* Orient M. Co., 1 Fed., 522, 531.
Jupiter M. Co. *v.* Bodie Con. M. Co., 11 Fed., 666, 676.
Strepey *v.* Stark, 7 Col., 614.
Zollars *v.* Evans, 5 Fed., 172, 175.
Patchen *v.* Keely, 19 Nev., 405, 416.

5. We have examined the objections made and exceptions taken by appellant to certain rulings of the court at the trial with refer-

The cases of Jackson *v.* Roby and Chambers *v.* Harrington, cited in the opinion of the majority of the court, are not in conflict with the foregoing view of the purport and effect of the decision in Bushnell *v.* Crooke Mining Company. In Jackson *v.* Roby no question of the jurisdiction was raised, and it may be assumed that the case was one of which the court had cognizance, either upon the ground of the diverse citizenship of the parties or the Federal question suggested by the pleadings. The case of Chambers *v.* Harrington was in the Supreme Court upon appeal from a territorial supreme court, and hence no question of the jurisdiction could arise.

529 The language of the court in that case, "And as the very essence of the trial is to determine rights by a regular procedure in such court, after the usual methods, which rights are dependent on the laws of the United States, we see no reason why, if the amount in controversy is sufficient in a case tried in a court of the United States or the proper case is made on a writ of error to a State court, the judgment may not be brought to this court for review, as in other similar cases," is not inconsistent with the view that, in order that the case-made shall be one of Federal cognizance, the jurisdiction must be made to appear by a proper averment pointing to the statute which the court shall be called upon to construe; and, if indeed, any expression of the court found in the language so quoted can be construed as countenancing a different doctrine, it is certainly discredited by the later decisions of the Supreme Court, to which reference has been made above.

(Endorsed:) Dissenting opinion. Filed May 23, 1898. F. D. Monckton, clerk.

530 United States Circuit Court of Appeals for the Ninth Circuit, October Term, 1897.

THE SHOSHONE MINING COMPANY, Appellant,
vs.
ROYAL J. RUTTER and F. W. BRADLEY, Appellees. } No. 413.

Appeal from the circuit court of the United States for the district of Idaho, northern division.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Idaho, northern division, and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in each case be, and the same is hereby, affirmed with costs.

(Endorsed:) Decree. Filed May 23, 1898. F. D. Monckton, clerk.

531 In the United States Circuit Court of Appeals in and for the Ninth Circuit.

SHOSHONE MINING COMPANY, a Corporation, Appellant,
vs.
ROYAL J. RUTTER and F. W. Bradley, Respondents.
} No. 413. (Consolidated Cases.)

Petition for Appeal.

The above-named appellant, The Shoshone Mining Company, conceiving itself aggrived by the decree made and entered on the 23rd day of May, 1898, in the above-entitled cause, does hereby appeal from said decree to the Supreme Court of the United States for the reasons specified in the assignments of error which *is* filed herewith, and prays that this appeal may be allowed, and that a transcript of the record of proceedings and papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

W. B. HEYBURN,
Solicitor for Appellant.

Dated this tenth day of January, A. D. 1899.

The foregoing claim of appeal is allowed.

WILLIAM B. GILBERT,
United States Circuit Judge.

Dated this tenth day of January, A. D. 1899.

(Endorsed:) Petition for appeal. Filed January 24th, 1899. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

532 In the United States Circuit Court of Appeals in and for the Ninth Circuit.

SHOSHONE MINING COMPANY, a Corporation, Appellant,
vs.
ROYAL J. RUTTER and F. W. BRADLEY, Respondents.
} No. 413. (Consolidated Case.)

Assignments of Error.

Now, on this 10th day of January, A. D. 1899, comes the appellant, The Shoshone Mining Company, by W. B. Heyburn, its solicitor, and says that the decree in said cause is erroneous and against the just rights of the appellant for the following reasons:

First. That it appears upon the face of the bill that the plaintiffs have an adequate remedy at law.

Second. That the said plaintiffs have not in and by said bill

made or stated such a cause as doth or ought to entitle them to any such discovery or relief as is thereby sought or prayed for from or against the defendant.

Third. Because it doth not appear that the action is one arising under the Constitution or laws of the United States.

Fourth. The decision of the court that the discovery of a ledge within the ground located long after such location has been made would validate a location made without or before such discovery.

Fifth. The decision of the court wherein it holds as follows:

"Is the place of the posting of the notice of an under-
533 ground discovery important?"

"It seems in this case to have been so regarded, and the locator of the 'Shoshone' attempted to post his notice upon the surface marked on the plat 'Shoshone disc.,' perpendicularly over the place of the underground discovery.

"The Kirby, as originally located, is indicated by the lines 1, 2, 3, 4, and 5. Some time after its location it was bonded to certain parties, and an official survey for patent was made of it in the form indicated by the lines 1, 2, 6, and 7, which did not include the place where the 'Shoshone' notice was posted, but as now surveyed and indicated by the lines 3, 5, 8, and 9 such place is included. The defendant company insists that the 'Shoshone' notice was posted in view of such first survey, and so that it might not be within the limits of any other claim, and that the 'Kirby' should be bound by such first survey. There can be no doubt but that if the owners of the 'Kirby' authorized such survey they could not subsequently so change it as to interfere with intervening attaching rights. It is, however, claimed by the 'Kirby' owners that such first survey was unauthorized by them, and was procured alone upon the motion of the party to whom they had bonded the claim.

"As I view the law, these questions are not material. In the first place, it is questionable what surface rights accrue to the discoverer of a ledge under the tunnel-site law. That statute—sec. 2323—only grants 'where a tunnel is run for the development of a vein or lode or for the discovery of mines, * * * the right of possession of all veins * * * not previously known to exist, discovered in such tunnel to the same extent as if discovered from the surface.'

"This gives a right only to the vein discovered, not previously
known to exist. It grants no surface rights nor other vein
534 than that discovered, but to this the same rights in extent as if discovered from the surface."

"I think the only reference in the law to surface rights is that in sec. 2322, which treats alone of locations made of ledges discovered upon the surface, whereby a certain surface is granted, together with every ledge whose apex is within such surface. To apply all the rights granted by this section to a discovery under sec. 2323 would be a most liberal construction. It would be granting to the locator all ledges apexing within the surface location he might make, even when the apex of the ledge he actually discovered far under ground might be without the boundaries of the surface located."

"Whatever should be the construction of the law, it has made

no direct provisions for surface rights for ledges discovered under the tunnel-site law, yet it is reasonable to presume that necessary surface rights are implied; but should they not be where they can be of utility? The original idea of surface rights was only for the purpose of working the vein and only the vein discovered. Surface rights on the top of a hill of a vein discovered far under ground can be of no practical value to such vein."

"Again, the law makes no provision for the posting of any notice of a ledge discovered under sec. 2323, but it may be fairly presumed that some notice to the world, aside from the tunnel-site location notice, should be made, that it may be known where in the tunnel the ledge is situated, and in what direction, and how far from the place of discovery it is claimed; but these purposes are more fully answered by placing such notice at the mouth of the tunnel where prospectors are more likely to go to ascertain what rights are claimed through the tunnel, and where surface rights could be made
535 useful. Certainly it serves no useful purpose to place such notice perpendicularly over the discovery, for there is not the least probability that this is on or over the apex which is most likely, in cases of deep discovery, to be beyond the boundaries of the surface so located, and a notice so posted is likely rather to mislead than direct another prospector who may find the apex beyond such surface limits."

"Certainly under the congressional mining act the place of posting the notice of even a location based upon a surface discovery is not important. The apex of the ledge must be within the surface claimed, while, independent of local laws, the notice might be elsewhere, if sufficiently near and sufficiently definite in its description to define the discovery and the claim. The place of the ledge discovery, and not that of the posting of the notice, is the more important question. This was in effect long since held in the case of Philpots *v.* Blasdel, 8 Nev. But whatever the law may be, modified as it is by local laws, as to the place of posting the notice of a surface discovery, I think the notice of a discovery made far under ground may be posted at any point upon the surface which is likely to give notice of the location of the ledge discovered, and that it is immaterial whether the place of posting is within the limits of another claim or not. It does not appear from the pleadings that the Shoshone claim was located in pursuance of sec. 2323, but it does appear that the alleged discovery is far under ground and that the notice was posted immediately over the place, not to mark where the apex of the ledge is, but where under ground the discovery was made, and I hold that as to the posting of the 'Shoshone' notice it is valid, even within the limits of another valid claim."

Sixth. The decision of the court wherein it holds as fol-
536 lows:

"Can a location be so based upon the alleged discovery of a ledge in its subterranean depths which has been previously discovered and located upon the surface is an important question affecting the validity of the 'Shoshone' claim.

"It is admitted that the ledge upon which the "Shoshone" is

located is the same which apexes in prior locations, to wit, the Bunker Hill, Stemwinder, Emma, Last Chance, and Tyler, and that the apex of the ledge runs through these claims, as indicated by the line of flags numbered 3 to 10, inclusive, upon the plat. There can be no doubt that the entire apex of that part of this ledge upon which the 'Shoshone' is located is covered by these several claims, yet it so happens, either under the absurdities of the mining law or its erroneous interpretation, that while the entire apex of a ledge may be covered by several claims, they may not altogether hold all portions of the ledge in its underground depths. If it were clear by the evidence in this case that the several claims which have the apex of the ledge can follow it in its depths under the 'Shoshone,' it would be equally clear that the 'Shoshone' would be invalid, but it is argued that some of these claims have no extralateral rights. It is settled that when a claim is so located that the apex crosses the side lines they become end lines between those planes the ledge can be followed, but it is also argued here that when those planes are more along the course of than across the ledge that the ledge cannot be followed beyond the boundaries of the claim. It is true, as suggested by counsel, that this court once instructed a jury (but with much doubt) that a ledge could not be followed more on its course than on its dip, and it does seem absurd, when the law says ledges may be followed on their 'depths,' for
537 the courts instead to say that they may be followed along their 'course' (but the court of appeals did not by word affirm this instruction of this court nor has that rule been supported by any court save a *nisi prius* court in Utah Territory). It would seem that the only logical conclusion of the holdings of the courts that ledges must be followed between the planes of the lines they cross is that they may be followed indefinitely between those planes prolonged; for to say that when such following would be more along the course than on the dip you must stop at the side-boundary line of the claim is making a new law which Congress never authorized. If there is any one right specially granted by Congress, it is to follow the ledge indefinitely on its depths, which the miner has always claimed and done, only he followed it on its dip, which, to some extent, the courts have unfortunately felt constrained, under their views of the law, to modify."

"While I am inclined to think that the 'Stemwinder' and the other claims named have such extralateral rights as will include this vein under the 'Shoshone,' I do not think that question can be determined in this case without further testimony, but it may be said that if there is any portion of the ledge within the 'Shoshone' which is not covered by their extralateral rights it will belong to the 'Shoshone,' if this latter claim is not void as against the 'Kirby.'"

Seventh. The decision of the court wherein it holds as follows:

"Just when this discovery was made I have not taken time to determine from the testimony, except that it was before the location of the 'Shoshone,' which, under the weight of authority, is considered sufficient. While I personally feel that any location of a min-

ing claim made before the discovery of a vein or lode within
538 its limits should be held void, *ab initio*, such opinion must yield to what is deemed the preponderance of authority. Certainly it is not claimed here that the location of a claim without the discovery of a ledge is valid prior to such discovery or is valid against another valid location made."

Eighth. Because the evidence shows that the "Kirby" location was not a valid one as against the location of the "Shoshone" mining claim.

Ninth. Because the evidence shows that the "Shoshone" location was a valid one and entitled to a patent from the United States, as applied for.

Wherefore appellant prays that said decree be reversed, and that the court may be directed to enter a decree for the appellant.

W. B. HEYBURN,
Solicitor for Appellant.

(Endorsed:) Assignments of error. Filed January 10, 1899. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

539 In the United States Circuit Court of Appeals in and for the Ninth Circuit.

SHOSHONE MINING COMPANY, a Corporation, Appellant, *vs.* ROYAL J. RUTTER and F. W. BRADLEY, Respondents.	No. 413. (Consolidated Cases.)

Bond on Appeal.

Know all men by these presents that we, The Shoshone Mining Company, as principal, and Fidelity & Deposit Company of Maryland, as sureties, are held and firmly bound unto Royal J. Rutter and F. W. Bradley in the full sum of five hundred dollars, to be paid to the said Royal J. Rutter and F. W. Bradley, their certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seal- and dated this 10th day of January, A. D. 1899.

Whereas lately, at a United States circuit court of appeals for the ninth circuit, in a suit depending in said court between The Shoshone Mining Company, appellant, and Royal J. Rutter and F. W. Bradley, appellees, a decree was rendered against the said Shoshone Mining Company in said case, and the said Shoshone Mining Company having appealed therefrom and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said Royal J. Rutter and
540 F. W. Bradley, citing and admonishing them to be and appear at a session of the Supreme Court of the United States,

to be holden at the city of Washington, on the sixth day of March next:

Now, the condition of the above obligation is such that if the said Shoshone Mining Company shall prosecute said appeal to effect and answer all damages and costs if it fail to make the said plea good, then the above obligation to be void; else to remain in full force and effect.

SHOSHONE MINING CO., [SEAL.]
By CHAS. SWEENY, *Pres't.* [SEAL.]

Attest:
[SEAL.] W. E. GOODSPEED.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, [SEAL.]
By W. E. ROBERTSON,
A Member of the Local Board of Directors.

Attest: W. R. MACKENZIE, *State Agent.* [SEAL.]

Signed, sealed, and delivered in the presence of—
MILTON S. FRIENDLY.

Approved by—
WILLIAM B. GILBERT, *Judge.*

(Canceled rev. stamps, 2½c.)

STATE OF OREGON, }
County of Multnomah, } *ss:*

I, William R. Mackenzie, being first duly sworn, say I am the State agent for Oregon of the Fidelity and Deposit Company of Maryland, a corporation which is surety on the foregoing undertaking; that said corporation is a resident and householder in Multnomah county, Oregon, and that it is worth the sum of two hundred thousand dollars over and above all its just debts and liabilities, exclusive of property exempt from execution. I further say that said corporation is by its articles of incorporation authorized and empowered to sign and execute such undertakings as the foregoing, and that said corporation has fully complied with the laws of the State of Oregon and is duly licensed to transact a surety
541 business within the State of Oregon for the current year.

W. R. MACKENZIE.

Subscribed and sworn to before me the 10th day of January, 1899.

[SEAL.] MILTON S. FRIENDLY,
Notary Public in and for Oregon.

(Endorsed:) Bond on appeal. Filed January 24th, 1899. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

542 United States Circuit Court of Appeals for the Ninth Circuit.

THE SHOSHONE MINING COMPANY, Appellant,
vs.
ROYAL J. RUTTER and F. W. BRADLEY, Appellees. } No. 413.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing five hundred and forty-one (541) pages, numbered from one (1) to five hundred and forty-one (541), inclusive, to be a true copy of the entire record and of the assignment of errors and of all proceedings in said circuit court of appeals, including the opinion and dissenting opinion, filed in the above-entitled case, as the same appear of record in said circuit court of appeals, and that the same constitute the transcript on appeal to the Supreme Court of the United States.

Attest my hand and the seal of said United States circuit court of appeals, at San Francisco, California, this 3rd day of February, A. D. 1899.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

[Two-cent U. S. internal-revenue stamp.]
[Five-cent U. S. internal-revenue stamp.]
[Two-cent U. S. internal-revenue stamp.]
[One-cent U. S. internal-revenue stamp.]
[Written across face of above stamps:] Cancelled Feb. 4, 1899. F. D. M., clerk.

543 In the Supreme Court of the United States.

SHOSHONE MINING COMPANY, a Corporation, Appellant,
vs.
ROYAL J. RUTTER and F. W. BRADLEY, Respondents.

Citation.

UNITED STATES OF AMERICA, *ss:*

To Royal J. Rutter and F. W. Bradley, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the city of Washington, on the sixth day of March next, pursuant to an appeal allowed and filed in the clerk's office of the United States circuit court of appeals for the ninth circuit, wherein The Shoshone Mining Company, a corporation, is appellant and you are respondents, to show cause, if any there be, why the decree made and entered against said appellant, as in the said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in the behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this tenth day of January, in the year of our Lord

one thousand eight hundred and ninety-nine, and the Independence of the United States the one hundred and twenty-third.

WILLIAM B. GILBERT,
United States Circuit Judge.

544 [Endorsed:] Dock. No. 413. In the Supreme Court of the United States. Shoshone Mining Company, appellant, *vs.* Royal J. Rutter and F. W. Bradley, respondents. Citation. Original. Filed January 24, 1899. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit. W. B. Heyburn, solicitor for appellant.

Endorsed on cover: Case No. 17,294. U. S. C. C. of appeals, ninth circuit. Term No., 208. The Shoshone Mining Company, appellant, *vs.* Royal J. Rutter and F. W. Bradley. Filed February 16th, 1899.

MAP "B"

Scale; 1 inch --200 feet

EXHIBIT 2.

17,294

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 208.

THE SHOSHONE MINING COMPANY,

Appellant,

vs.

ROYAL J. RUTTER and F. W. BRADLEY,

Appellees.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF OF APPELLANT.

STATEMENT OF THE CASE.

On the 21st day of August, 1895, the Shoshone Mining Company made application for patent for the "Shoshone" lode claim, situated in the Yreka Mining District, Shoshone county, Idaho, the publication of which application was duly made, and on the 22nd day of October, 1895, Royal J. Rutter and F. W. Bradley filed their protest and adverse claim against said application for patent. The area involved in the adverse

claim is approximately shown by the plat attached to the amended complaint. (Trans. p. 29.)

On November 15, 1895, the adverse claimants filed their bill of complaint in support of said adverse claim, in the United States Circuit Court for the District of Idaho, Northern Division, on the equity side of the Court. (Trans. p. 1.)

Thereafter the applicant, the Shoshone Mining Company, demurred to the said bill upon the following grounds: (Trans. p. 6.)

I.

That a compliance has not been made in said bill with any of the requisites of rule 20 of the Equity Rules of this Court.

II.

That the defendant's residence or place of abode is not stated in said Bill.

III.

That the said Bill is deficient in certainty, in this: that it does not state under the laws of what State or under what laws the defendant is incorporated or has any legal existence.

IV.

That it appears upon the face of the Bill that the plaintiffs have an adequate remedy at law. (Trans. p. 7.)

V.

That the said plaintiffs have not in or by the said Bill, made or stated such a cause as doth or ought to entitle them to any such discovery or relief as is thereby sought or prayed for, from or against this Defendant.

VI.

That the value of the subject matter of the plaintiffs' action is beneath the dignity of the Court, in that it does not show by the Bill that the matter in dispute exceeds, exclusive of interest and costs, the sum of two thousand dollars.

VII.

Because the said Bill does not show on its face any diverse citizenship between the parties complainant and defendant.

VIII.

Because the Bill does not show on its face that the action is one arising under the constitution or laws of the United States.

Whereupon the complainant presented to the Court an amended bill of complaint. (Trans. p. 8.)

Whereupon the Court held that all except two of the said several causes of demurrer to the original complaint were cured by the amended complaint, which complainants were

permitted to file. (Trans. p. 15.) That as to the fourth, seventh and eighth causes of demurrer, the said demurrer should be overruled, to which the defendant excepted, which exception was allowed and a bill of exceptions duly settled. Trans. p. 17.)

That thereupon the defendant, the Shoshone Mining Company, demurred to the said amended bill of complaint, upon the grounds stated in the fourth, seventh and eighth causes of the first demurrer, which said demurrer was by the Court overruled, to which the defendant excepted, which exception was allowed, and the bill of exceptions was duly settled. (Trans. pp. 13, 14.)

The opinion of the Court upon both demurrers is given together on pages 15-17 of Transcript.

The defendant thereupon answered and the plaintiffs replied. The second amended complaint, which was filed on the 21st of May, 1897, (Trans. pp. 24-29) is the statement of the plaintiffs' case to which the defendant filed its answer July 8, 1896. (Trans. pp. 18-23.)

The opinion overruling the demurrer to the several complaints of the plaintiffs was filed on June 22, 1896, and was made to apply to all the demurrers and the defendant's demurrer was made to apply to all of the complaints.

It appears by the complaint (Trans. p. 25) that the plain-

tiffs and defendant are each citizens of the State of Idaho.

The complaint then alleges that on the 20th of August, 1895, the plaintiffs were the owners and in possession of the Kirby Fraction mining claim; that on the 11th of July, 1886, while the premises were vacant, unoccupied, unappropriated mineral lands, open to exploration and location by citizens of the United States, certain citizens of the United States went upon the premises and discovered a lode of rock in place bearing silver, lead and other valuable minerals, and located the same as a mining claim. It then describes the acts of location and record. (Trans. pp. 25-26.) And alleges that they have performed the necessary labor required by law during each year.

It then alleges that the defendant, the Shoshone Mining Company, in August, 1895, caused an official survey of the Shoshone claim to be made so as to overlap upon the Kirby Fraction lode claim, and upon such official survey filed application for patent in the United States Land Office, for the Shoshone claim; and that the plaintiffs, on behalf of the Kirby Fraction claim, filed their adverse in said Land Office, and this suit is brought in support of said adverse. That the plaintiff is damaged more than $10,000 by reason of the acts complained of. (Trans. p. 28.) They allege that the acts complained of wrongfully imperil, cloud and encumber their title. They pray for a decree that they are the owners of and entitled to the possession of the premises in conflict, and that

the defendant, the Shoshone Mining Company, has no title or right of possession of the said premises, or any part thereof. They ask for a restraining order and general relief. To this amended complaint the defendant, the Shoshone Mining Company, filed its answer, denying that the complainant was the owner or in possession of the ground and premises claimed; denied the location of the Kirby Fraction claim; denied the discovery of mineral thereon, as set forth in the complaint; denied the expenditure of $100 in labor, as required by law; denied that the description of the Kirby Fraction lode as given in the amended bill was within the limits and the boundaries established on the ground, or of any boundaries ever established as the Kirby Fraction lode claim. (Trans. pp. 19-20.)

The defendant then admits that it is the owner of the mining claim called the "Shoshone," and that it caused the same to be surveyed for patent, and that on the 24th day of August, 1895, it applied for patent in which it alleged that it was the owner and in the possession of the whole of the Shoshone mining claim, including the ground in controversy, and denied that the complainants, or any person through whom they claimed, had ever been in possession of any portion of the ground and premises included within the defendant's application for patent. Defendant then admits the filing of the adverse claim by plaintiffs but denies that they brought any

suit in support thereof within a period of 30 days in a *Court of competent jurisdiction.* They deny that they imperil or cloud the title of the Kirby Fraction, but admit that they gave out and alleged that the location of the Kirby Fraction was invalid and ineffectual to appropriate the same as a mining claim.

Denies that the complainants have no plain, speedy and adequate remedy at law for the alleged injuries complained of in their bill of complaint. They then especially plead forfeiture by reason of the failure to perform the annual assessment work. (Trans. p. 21.)

The defendant then affirmatively alleges the location, on the 21st of March, 1894, of the Shoshone mining claim; the conveyance by the locator to the defendant, the Shoshone Mining Company, and the performance of the annual labor thereon. That the defendant is and has, since the 26th of March, 1894, been in the continued and exclusive possession of the Shoshone mining claim, and the ground in controversy, holding and claiming the same by virtue of the location of the same as a mining claim. (Trans. pp. 22-23.)

They then interpose a special defense that the complainants had an adequate remedy at law, claiming the same benefit from said allegation as on demurrer.

It will be observed (p. 21, folio 45) that the defendant also interposes a special defense that the suit was not com-

menced in a *Court of competent jurisdiction.* These two special defenses, raising the question both as to the Federal jurisdiction and the form of the action. To this answer the complainant filed its replication. (Trans. p. 24.)

By stipulation (Trans. p. 36) this case was consolidated with the case of Shoshone Mining Company vs. Royal J. Rutter and F. W. Bradley.

To avoid a reference of the case to take the testimony, the Court consenting, the parties stipulated to take the testimony in open court, before the Judge. (Trans. p. 62, folio 132.)

The plaintiffs introduced evidence as to the location of the "Kirby Fraction" mining claim, upon which they seek to recover in this action, and which they claim was located by their predecessors in interest on the 11th of July, 1886. They then introduced deeds conveying the "Edith" and "Kirby" mining claims to the plaintiffs. No conveyances were introduced purporting to convey to the plaintiffs any interest in the "Kirby Fraction" mining claim.

It appeared by the evidence of two of the locators of the "Kirby Fraction" claim that prior to the making of said location they had located a mining claim called the "Edith" covering the ground afterward located as the "Kirby Fraction." That they had not abandoned, nor intended to abandon the "Edith" location before, or at the time, or even after the mak-

ing of the location of the "Kirby Fraction"; that they intended to claim under both locations. That they made no discovery of a mineral bearing ledge of rock in place on the "Kirby Fraction" prior to the location thereof. But the Court held that even though no discovery were made before the location, if a discovery were afterward made, the location would be validated thereby, except as against intervening rights.

The testimony of all the witnesses on behalf of both plaintiffs and defendant, clearly shows that no ledge of rock in place containing any minerals of value has ever been discovered within the "Kirby Fraction" claim, and the Court in passing upon this question says, that were it required that the evidence should remove all reasonable doubts as to such discovery that he should answer the question in the negative. (22nd Assignment of Error. Trans. p. 33, folio 71-72.

The evidence showed that defendant was in possession of the premises in controversy.

The defendant then offered in evidence the sworn statement of the plaintiff, Bradley, made by him, and filed for record in the County Recorder's office, that the annual assessment labor upon the "Kirby Fraction" claim for the years 1895 and 1896, was performed by the Bunker Hill & Sullivan Mining & Concentrating Company. The offer was made for the purpose of showing that the said Bunker Hill & Sullivan

Mining & Concentrating Company was the real owner of the claim, and that as a consequence the plaintiffs could not maintain this action. Also that if the said company was not the real owner of the claim its performance of the annual labor could not be taken advantage of by the plaintiffs in this action, no agency being shown.

The Court sustained the objection to the introduction of this testimony on all grounds. Defendant then asked both plaintiffs while on the witness stand whether or not they were the real owners of the property, and whether the Bunker Hill & Sullivan Mining & Concentrating Company was not the real owner of the property, and whether they or either of them had any interest in the property in dispute, to all of which questions objection was interposed and the objection sustained. The defendant maintained and sought to prove that the plaintiffs were "straw men" and not the real parties in interest, but was not allowed to introduce any proofs of this fact, the Court holding that it was immaterial and that said proof would constitute no defense to their right to patent the ground in controversy or maintain the action.

The defendant sought to prove by Deputy Mineral Surveyor Mr. Loring on the witness stand, that he had in making the official survey of the "Kirby Fraction" claim adopted a new point of discovery different from that upon which the

location was based. The Court held that this was immaterial. (11th Assignment of Error is based upon this ruling.)

At the close of plaintiffs' testimony, defendant moved to dismiss plaintiffs' Bill for the following reasons:

First—For the reason that this Court has no jurisdiction of the case as a Court of Equity.

Second—That the plaintiffs have failed to show that this ground was vacant, unoccupied, public mineral land, subject to location at the time of the location of the Kirby claim, but on the contrary have shown by the locators under whom they claim, that at the time the location was made, the ground was not a part of the public domain or subject to location; that it had been located as the "Edith" claim, which claim was then a valid, subsisting mining claim; that the discovery and location of the "Kirby" was within the limits and boundaries of the "Edith" location.

Third—The plaintiffs have failed to show that prior to the making of the location of the Kirby, they discovered any lode or ledge of mineral-bearing rock in place, such as the law requires, as the basis of a mining location, but on the contrary, have shown affirmatively by the testimony of the locators that they did not make such discovery.

Fourth—That if any discovery has been shown to have been made, or any ledge to have been discovered upon the

"Kirby" claim, that it was long after the location of the claim.

Fifth—That no discovery of any ledge, such as the law contemplates a mining claim should be located upon, has been made, and that such fact appears from the testimony of the plaintiffs in this case.

Sixth—That the area of ground claimed in this suit lies outside of and beyond the lines of the "Kirby" claim, as they were definitely fixed and marked upon the ground by the official survey made by Mr. Loring: That the southwest corner of the claim is extended about 300 feet beyond where it was placed, and notice was given to the world that they had drawn in this line.

The motion to dismiss plaintiffs' Bill was denied, and an exception allowed.

The defendant then introduced the notice of location of the "Shoshone" mining claim, from which notice it appears that the discovery upon which the location was based was made at a point about 1,200 feet beneath the surface of the mountain, and was reached by passing through the tunnels and excavations of an adjoining mine. That the point of discovery was not within the boundaries of any located mining claim. That it was made upon a portion of a ledge, the top or apex of which was within another location and patented to other parties. That the portion of the ledge upon which the location was made was so situated that no other location

could claim it by reason of any extra lateral rights or otherwise. That the point on the surface where the notice of the defendant's location was placed, was vacant and unoccupied mineral lands of the United States, subject to location as such upon a proper discovery of the mineral being made therein. It appeared from the testimony that while the ground may have originally been included within the surface boundaries of the "Kirby Fraction" alleged location, the lines of that claim had been so adjusted by the United States Deputy Mineral Surveyor in surveying the "Kirby Fraction" claim for patent, as to leave the point where the notice of the location of the "Shoshone" claim was posted outside of the "Kirby Fraction" lines. The Court held that this was immaterial; that the location of a mining claim could not be made upon such a discovery as was claimed for the "Shoshone"; and that no surface rights would be acquired by reason of such a discovery or a location based thereon. That if the surface ground was claimed at all it should be at some point where it would be available for the purpose of working the ledge claimed, and not on top of the mountain immediately above the point of discovery.

The defendant offered in evidence the notice of location of the "Shoshone" claim, and proof of the recording of the same; also proof of the making of the discovery of a ledge of mineral bearing rock in place therein, as above described, prior to the making of such location; and also introduced

proof of the marking of the boundaries of the claim upon the surface of the ground as described in said notice and of the performance of a large amount of development work upon said claim, and a conveyance by deed from the locator to the Shoshone Mining Company, the defendant.

The defendant then introduced evidence showing the invalidity of the location of the "Kirby Fraction" claim.

The Court took the matter under advisement on May 26, 1897, and on June 25, 1897, filed a decision in which he holds that the "Kirby Fraction" is a valid location, and prior to the "Shoshone" and is entitled to judgment for the ground in controversy and for a patent (Trans. p. 29-196), and in effect that the "Shoshone" location is invalid. No other findings of fact or conclusions of law were found by the Court than those contained in the said decision.

This case is consolidated for the purpose of appeal with the case of "The Shoshone Mining Company v. Royal J. Rutter and F. W. Bradley," for the reason that both suits involve the title of the "Kirby Fraction" and the "Shoshone" claims and the right to patent them, and the claims of both parties in each case rest substantially upon the same facts. Such questions of law and fact as pertain solely to the latter case will be considered in this brief after disposing of the first case.

SPECIFICATION OF ERRORS.

First—That it appears upon the face of the Bill that the plaintiffs have an adequate remedy at law.

Second—That the said plaintiffs have not, in or by said Bill, made or stated such a cause as doth or ought to entitle them to any such discovery or relief as is thereby sought or prayed for, from or against this defendant.

Third—Because that it does not appear that the action is one arising under the constitution or laws of the United States, or any treaty made under its authority.

Fourth—Because the Court refused to admit in evidence defendant's exhibit 4, being the affidavit of plaintiff Bradley that during the year 1895 the Bunker Hill & Sullivan Mining & Concentrating Company did the annual assessment work upon the "Kirby Fraction" claim as the owner thereof, which is in words and figures as follows:

DEFENDANT'S EXHIBIT 4.

PROOF OF LABOR.

State of Idaho,)
) ss.
County of Shoshone.)

Before me personally appeared F. W. Bradley, who, being first duly sworn, says: That during the year 1895, at least $30,000.00 has been expended for underground development work in the Bunker Hill & Sullivan group of mines, which consists of the following lode mining claims, viz:

Ollie McMillan, No Name, Sarnia, Miners' Delight, Sullivan Extension, Mabundaland, Zululand, Blue Bird, Rookery, Richmond, Offset, Kirby Fraction, Fraction, Sullivan Fraction, Bulah, Bonanza Fraction, Alla, South, Essex, Overlap, Matabeleland, Homestake, Aspen, Allie, Silver, Bought Again, Helen Marr, Sancho Fraction, Cypress, Iron Hill, East, George Arnett, Harris, Mashonaland, Butternutt, Maple, Triangle, Josie, Bullion, Miles, Grant, Stemwinder Fraction, Hemlock.

Situate in Yreka Mining District, County of Shoshone, State of Idaho. That such expenditure was made for the direct development of the said group of contiguous mining

claims at the expense of the Bunker Hill & Sullivan Mining & Concentrating Company, owner of said group of claims, for the purpose of holding said group of claims.

F. W. BRADLEY,

Subscribed and sworn to before me this 10th day of December, 1895.

M. J. SINCLAIR,

[SEAL] Notary Public.

Recorded at the request of F. W. Bradley, December 13, 1895, at 9 o'clock a. m.

BARRY N. HILLARD,
County Recorder.

By L. A. DOHERTY, Deputy.

Fifth—Because the Court refused to admit in evidence defendant's exhibit 5, being the notice of assessment work on the "Kirby Fraction" claim for the year 1895, made and filed by plaintiff Bradley as manager of the Bunker Hill & Sullivan Mining & Concentrating Company, which said notice is in words and figures as follows:

DEFENDANT'S EXHIBIT 5.

Notice of assessment work on mining claims.

Notice is hereby given to all whom it may concern, that

the Bunker Hill & Sullivan Mining & Concentrating Company has during the year 1895 expended for underground development work in the Bunker Hill & Sullivan group of mines the sum of $30,000.00 and claims that such expenditure was made for the direct purpose of developing and holding according to law all the following and adjoining and contiguous mining claims which are worked together as one group and claimed by the Bunker Hill & Sullivan Mining & Concentrating Company:

Ollie McMillan, No Name, Sarnia, Miners' Delight, Sullivan Extension, Mabundaland, Zululand, Blue Bird, Rookery, Richmond, Offset, Kirby Fraction, Fraction, Sullivan Fraction, Spruce Fraction, Bulah, Bonanza Fraction, Alla, South, Essex, Overlap, Matabeleland, Homestake, Aspen, Allie, Silver, Bought Again, Helen Marr, Sancho Fraction, Tamarack, Cypress, Iron Hill, East, George Arnett, Harris, Mashonaland, Butternutt, Maple, Triangle, Josie, Bullion, Miles, Grant, Stemwinder Fraction, Hickory, Hemlock.

Bunker Hill & Sullivan Mining & Concentrating Company, by F. W. Bradley, Manager.

We, the undersigned, on the 11th to 14th days of De-

cember, 1895, have posted a copy of this notice on each of the above mentioned mining claims.

GEORGE A. SONNEMANN,
W. S. HARRIS,
LLEWELLYN LLEWELLYN.

Recorded at the request of F. W. Bradley, December 17, 1895, at 2 o'clock p. m.

BARRY N. HILLARD,
County Recorder.

By L. A. DOHERTY, Deputy.

Sixth—Because the Court refused to admit in evidence defendant's exhibit 3, being the affidavit of plaintiff Bradley, that during the year 1896, the Bunker Hill & Sullivan Mining & Concentrating Company did the annual assessment work upon the "Kirby Fraction" claim as the owner thereof, in words and figures as follows:

DEFENDANT'S EXHIBIT 3.

PROOF OF LABOR.

State of Idaho,)
) ss.
County of Shoshone.)

Before me personally appeared F. W. Bradley, who, being first duly sworn, says, that he is the agent for the Bunker

Hill & Sullivan Mining & Concentrating Company, and that during the year 1896, at least $50,000.00 has been expended for underground development work on the Bunker Hill & Sullivan group of mines which consist of the following lode mining claims:

Ollie McMillan, Miners' Delight, Zululand, Fraction, Bulah, South, Matabeleland, Allie, Helen Marr, Cypress, George Arnett, Butternutt, Josie, Grant, Hemlock, Scoffield, Whoop Up, Buckeye, B. W. Fraction, No Name, Sullivan Extension, Blue Bird, Offset, Bought Again, Tamarack, East, Mashonaland, Triangle Fraction, Sullivan Fraction, Bonanza Fraction, Essex, Homestake, Silver, Sancho Fraction, Iron Hill, Harris, Maple, Bullion, Stemwinder Fraction, Stopping, Krouger, La Crosse, W. H. Fraction, Ben Herr, Sarnia, Mabundaland, Rookery, Kirby Fraction, Spruce Fraction, Alla, Overlap, Aspen, Miles, Hickory, African Reef, Johannesburg, Summit, Stemwinder.

Situated in Yreka Mining District, Shoshone County, Idaho, and that such expenditure was made for the direct development of the said group of contiguous mining claims at the expense of the Bunker Hill & Sullivan Mining & Concentrating Company, owner of said group of claims, for the

purpose of holding all of the above mentioned lode mining claims.

F. W. BRADLEY,

Subscribed and sworn to before me this 4th day of December, 1896.

M. J. SINCLAIR,
Notary Public.

Recorded at the request of F. W. Bradley, December 7, 1896, at 9 o'clock a. m.

BARRY N. HILLARD,
County Recorder.

By JOHN P. SHEEHY, Deputy.

Seventh—Because the Court refused to admit in evidence defendant's exhibit 2, being the notice of assessment work on the "Kirby Fraction" claim for the year 1896, made and filed by plaintiff Bradley, as manager of the Bunker Hill & Sullivan Mining & Concentrating Company, which said notice is in words and figures as follows:

DEFENDANT'S EXHIBIT 2.

Notice of assessment work on mining claims.

Notice is hereby given to all whom it may concern that

the Bunker Hill & Sullivan Mining & Concentrating Company has during the year 1896 expended for under ground development work in the Bunker Hill & Sullivan group of mines the sum of over $50,000.00, and claims that such expenditure was made for the direct purpose of developing and holding according to law all the following adjoining and contiguous mining claims which are worked together as one group and claimed by the Bunker Hill & Sullivan Mining & Concentrating Company:

Ollie McMillan, Miners' Delight, Zululand, Richmond, Fraction, South, Matabeleland, No Name, Sullivan Extention, Blue Bird, Offset, Bonanza Fraction, Essex, Homestake, Sarnia, Mabundaland, Rookery, Kirby Fraction, Alla, Overlap, Aspen, Allie, Helen Marr, Cypress, George Arnett, Butternutt, Josie, Grant, Hemlock, Scoffield, Whoop Up, Buckeye, B. W. Fraction, Silver, Sancho Fraction, Iron Hill, Harris, Maple, Bullion, Stemwinder Fraction, Stopping, Krouger, La Crosse, W. H. Fraction, Ben Herr, Bought Again, Tamarack, East, Mashonaland, Triangle Fraction, Miles, Hickory, African Reef, Johannesburg, Summit, Stemwinder.

Bunker Hill & Sullivan Mining & Concentrating Company, by F. W. Bradley, Manager.

Eighth—Because the Court refused to allow the defend-

ant to show by Mr. Rutter when on the witness stand, that neither Mr. Rutter nor Mr. Bradley had any interest in the "Kirby Fracton" claim, but that it belonged to the Bunker Hill & Sullivan Mining & Concentrating Company, and that they were simply allowing it to remain in the name of these individuals for such benefit as they might derive from said title so remaining during the litigation concerning the same; that Mr. Rutter has disposed of his interest to said company, and that Mr. Bradley holds the interest standing in his name for the Bunker Hill & Sullivan Mining & Concentrating Company, and that the said Bunker Hill & Sullivan Mining & Concentrating Company are the real parties in interest, and the only parties who can maintain this action.

Ninth—Because the Court refused to allow the defendant to show on cross-examination of complainant Bradley that he was not the real owner of any interest in the premises sued for. But that the Bunker Hill & Sullivan Mining & Concentrating Company was the real owner of said premises.

Tenth—Because the Court refused to allow the defendant's Counsel to inquire of the said Bradley while upon the witness stand, as to whether or not all of the work that had been done upon the "Kirby Fraction" claim for the years 1894, 1895 and 1896, had not been done by the Bunker Hill & Sullivan Mining & Concentrating Company, and paid for by them, and whether or not he did not file the sworn state-

ment relative to the doing of said work as shown by defendant's exhibits 2, 3, 4 and 5.

Eleventh—Because the evidence shows that the "Kirby Fraction" mining claim was not a valid location:

1. Because the ground had already been located as the "Edith" mining claim.

2. Because no discovery such as is required by law was made upon the "Kirby Fraction" prior to the location thereof.

3. Because no valid discovery was made upon the "Kirby Fraction" claim.

Twelfth—To the decision of the Court that the discovery of the ledge within the ground located, after such location, would validate the location made without, or before a discovery.

Thirteenth—Because the evidence shows that the boundaries of the "Kirby Fraction" claim as marked upon the ground, were not as described in the Bill of Complaint, or in the adverse claim filed in the United States land office.

Fourteenth—Because the evidence shows that the "Shoshone" mining claim was a valid location and entitled to recover in this action, and to receive a patent for the land claimed in its application for patent.

Fifteenth—Because the evidence showed that the loca-

tion of the "Shoshone" claim was made upon a ledge of mineral bearing rock in place, upon the vacant and unappropriated public domain of the United States, and said location was good as against every person, and entitled the owners thereof to a patent from the United States.

Sixteenth—Because the evidence showed that no other mining claim located upon the apex of said ledge or otherwise was entitled to said lode, or any part thereof, as against the "Shoshone" mining claim.

Seventeenth—Because the evidence showed that the defendant was entitled to recover in this action.

Eighteenth—To the decision of the Court wherein it holds as follows:

"Is the place of the posting of the notice of an underground discovery important?"

"It seems in this case to have been so regarded, and the locator of the "Shoshone" attempted to post his notice upon the surface marked on the plat "Shoshone Disc.," perpendicularly over the place of the underground discovery.

"The 'Kirby' as originally located, is indicated by the lines 1, 2, 3, 4 and 5. Some time after its location it was bonded to certain parties and an official survey for patent was made of it in the form indicated by the lines 1, 2, 6 and 7, which did not include the place where the "Shoshone" notice

was posted, but as now surveyed and indicated by the lines 3, 5, 8 and 9, such place is included. The defendant company insists that the "Shoshone" notice was posted in view of such first survey and so that it might not be within the limits of any other claim, and that the "Kirby" should be bound by such first survey. There can be no doubt that if the owners of the "Kirby" authorized such survey they could not subsequently so change it as to interfere with intervening attaching rights. It is, however, claimed by the "Kirby" owners that such first survey was unauthorized by them, and was procured alone upon the motion of the party to whom they had bonded the claim.

"As I view the law, these questions are not material. In the first place, it is questionable what surface rights accrue to the discoverer of a ledge under the tunnel site law, that statute—Sec. 2323—only grants "where a tunnel is run for the development of a vein or lode, or for the discovery of mines . . . . the right of possession of all veins . . not previously known to exist, discovered in such tunnel to the same extent as if discovered from the surface."

"This gives a right only to the vein discovered, not previously known to exist. It grants no surface rights nor other vein than that discovered, but to this, the same rights in extent as if discovered, from the surface

"I think the only reference in the law to surface rights is

that in Sec. 2322, which treats alone of locations made of ledges discovered upon the surface, whereby a certain surface is granted, together with every ledge whose apex is within such surface. To apply all the rights granted by this section to a discovery under Sec. 2323 would be a most liberal construction. It would be granting to the locater all the ledges apexing within the surface location he might make,even when the apex of the ledge he actually discovered far under ground might be without the boundaries of the surface located.

"Whatever should be the construction of the law it has made no direct provisions for surface rights for ledges discovered under the tunnel site law, yet it is reasonable to presume that necessary surface rights are implied. But should they not be where they can be of utility? The original idea of surface rights was only for the purpose of working the vein and only the vein discovered. Surface rights on the top of a hill of a vein discovered far under ground can be of no practical value to such vein.

"Again, the law makes on provision for the posting of any notice of a ledge discovered under Sec. 2323, but it may be fairly presumed that some notice to the world, aside from the tunnel site location notice, should be made, that it may be known where in the tunnel the ledge is situated, and in what direction, and how far from the place of discovery it is claim-

ed; but these purposes are more fully answered by placing such notice at the mouth of the tunnel where prospectors are more likely to go to ascertain what rights could be claimed through the tunnel, and where surface rights could be made useful. Certainly it serves no useful purpose to place such notice perpendicularly over the discovery, for there is not the least probability that this is on or over the apex which is most likely, in cases of deep discovery, to be beyond the boundaries of the surface so located, and a notice so posted is likely rather to mislead than direct another prospector, who may find the apex beyond such surface limits.

"Certainly, under the congressional mining act the place of posting the notice of even a location based upon a surface discovery is not important. The apex of the ledge must be within the surface claimed, while independent of local laws, the notice might be elsewhere, if sufficiently near and sufficiently definite in its discription to define the discovery and the claim. The place of the ledge discovery, and not that of the posting of the notice, is the more important question. This was in effect long since held in the case of Phillpots v. Blasdel, 8 Nev. But whatever the law may be, modified as it is by local laws, as to the place of posting the notice of a surface discovery, I think the notice of a discovery made far under ground may be posted at any point upon the surface which is likely to give notice of the lo-

cation of the ledge discovered, and that it is immaterial whether the place of posting is within the limits of another claim or not. It does not appear from the pleadings that the Shoshone claim was located in pursuance of Sec. 2323, but it does appear that the alleged discovery is far under ground and that the notice was posted immediately over the place,not to mark where the apex of the ledge is but where underground the discovery was made, and I hold that as to the posting of the 'Shoshone' notice it is valid, even within the limits of another valid claim."

Nineteenth—The decision of the Court wherein it holds as follows:

"Can a location be so based upon the alleged discovery of a ledge in its subterranean depths, which has been previously discovered and located upon the surface, is an important question affecting the validity of the 'Shoshone' claim.

"It is admitted that the ledge upon which the 'Shoshone' is located is the same which apexes in prior locations to-wit: The Bunker Hill, Stemwinder, Emma, Last Chance and Tyler, and that the apex of the ledge runs through these claims as indicated by the line of flags, numbered 3 to 10, inclusive, upon the plat. There can be no doubt that the entire apex of that part of the ledge, upon which the 'Shoshone' is located, is covered by these several claims, yet it so happens, either under the absurdities of the mining law or its erroneous interpre-

tation, that while the entire apex of a ledge may be covered by several claims they may not altogether hold all portions of the ledge in its underground depths. If it were clear by the evidence in this case that the several claims, which have the apex of the ledge, can follow it in its depths under the 'Shoshone' it would be equally clear that the 'Shoshone' would be invalid, but it is argued that some of these claims have no extra-lateral rights. It is settled that when a claim is so located that the apex crosses the side lines they become end lines, between whose planes the ledge can be followed, but it is also argued here that when these planes are more along the course of than across the ledge, that the ledge cannot be followed beyond the boundaries of the claim. It is true as suggested by counsel, that this court once instructed a Jury (but with much doubt) that a ledge could not be followed more on its course than on its dip, and it does seem absurd when the law says ledges may be followed on their "depths," for the courts instead to say that they may be followed along their "course." (But the Court of Appeals did not by word affirm this instruction of this Court, nor has that rule been supported by any Court save a *nisi prius* court in Utah Territory. It would seem that the only logical conclusion of the holdings of the courts that ledges must be followed between the planes of the lines they cross is that they may be followed indefinitely between those planes prolonged; for to say that when such following would be more along the course than on the dip you

must stop at the side boundary line of the claim, is making a new law which Congress never authorized. If there is any one right specially granted by congress it is to follow the ledge indefinitely on its depths. which the miner has always claimed and done, only he followed it on its dip, which to some extent the Courts have unfortunately felt constrained, under their views of the law. to modify.

"While I am inclined to think that the 'Stemwinder' and the other claims named have such extra-lateral rights as will include this vein under the 'Shoshone,' I do not think that question can be determined in this case without further testimony, but it may be said that if there is any portion of the ledge within the 'Shoshone,' which is not covered by their extra-lateral rights it will belong to the 'Shoshone' if this latter claim is not void as against the 'Kirby.' "

Twentieth—The decision of the Court wherein it holds as follows:

"Is the 'Kirby' a valid location?"

"It is said that it is void because re-located before the 'Edith' location—which was substantially the same ground. —had become forfeited or abandoned. Of course it is clear that ground once located cannot be re-located by other parties until forfeiture or abandonment of the first location. Citations on this question are unnecessary.

"It has been said that the locators of the 'Edith' did not intend to abandon it before locating the 'Kirby.' The fact is that they did not intend to abandon the ground but only the name. The same parties who located the 'Edith' concluded to add to their ground as first located, and did so by changing their lines and locating as the 'Kirby.' I cannot doubt the right of locators to change their lines as well as the names of their claims as often as they desire, so long as they do not interfere with other rights. Any change in the name of the claim or its boundaries by the owners thereof, certainly, is good from the day when the change is made, if no other rights have intervened and the location or re-location, if it may be so termed, of this ground as the 'Kirby' is good from the day of such location.

"That subsequently, deeds were made by the parties of the 'Edith' does not prove that they considered that both the 'Edith' and 'Kirby' were in existence, but this only shows that some over-cautious attorney perhaps, or whoever may have so advised, had an unnecessary thing done, as a matter of precaution. It is not the name but the ground that is conveyed. The name only designates or identifies the ground; it may be conveyed by metes and bounds as effectively as by a name, and a conveyance by any name conveys the ground, though it may be known by many names."

Twenty-first—The decision of the Court wherein it holds as follows:

"Has the 'Kirby' a ledge?"

"Were it required that the evidence should remove all reasonable doubt, I should answer this question in the negative, but under the liberal rule that prevails as to the constitution of a ledge within the law, I think the preponderance of evidence is in favor of such a discovery. It does, however, sometimes appear that the rule that a ledge within the law is that "which the miner would follow with the hope of finding ore" is often carried so far as to lead to a perversion of the intent of the law. It results that almost any kind of a crevice filled with matter different from the general country rock is held a sufficient ledge upon which to base a location, and as a result all mining countries are plastered over with locations, as worthless as the lava beds of this great interior basin."

Twenty-second—The decision of the Court wherein it holds as follows:

"Just when this discovery was made, I have not taken time to determine from the testimony, except that it was before the location of the 'Shoshone,' which, under the weight of authority, is considered sufficient. While I personally feel that any location of a mining claim made before the discovery of a vein or lode within its limits should be held void, *ab initio*,

such opinion must yield to what is deemed the preponderance of authority. Certainly it is not claimed here that the location of a claim without the discovery of a ledge is valid prior to such discovery, or is valid against another valid location made."

Twenty-third—The decision of the Court wherein it holds as follows:

"It seems altogether probable that whatever ledge the plaintiffs have is but a spur or a part of the main ledge passing through the other claims named, the apex wherein is indicated as above stated, but until it descends and becomes a part of such ledge the plaintiffs are entitled to it.

"It has also been suggested that thus far the plaintiffs' ledge has not been proven a valuable one—that is not necessary—if it is sufficient in the beginning to justify a location, which I have reluctantly held, it is sufficient for all time, even if it never becomes valuable."

Twenty-fourth—The decision of the Court wherein it holds as follows:

"The whole case considered, it must be held that the 'Kirby' is a valid location and prior to the 'Shoshone' and that the plaintiffs are entitled to judgment therefor against the defendant for a patent to the ground in dispute between the parties and to their costs, and it is ordered accordingly."

Twenty-fifth—The failure of the Court to make general or special findings of fact, unmixed with discussion of questions of the law and testimony.

ARGUMENT.

FEDERAL JURISDICTION.

The parties plaintiff and defendant are all citizens and residents of the state of Idaho. It follows that if the Circuit Courts of the United States have jurisdiction of the cause it must be because of the character of the question involved.

The presumption is that a cause is without the jurisdiction of the Circuit Court, unless the contrary affirmatively appears.

Peper v. Fordyce, 119 U. S., 469.
Grace v. American Central Ins. Co., 109 U. S., 283.
Turner v. The Bank of North America, 4 Dall., 8.
Ex Parte Smith, 94 U. S., 455.
Robertson v. Cease, 97 U. S., 646.

The United States Circuit Courts are courts of limited jurisdiction, and it is an inflexible rule that it cannot be exercised by consent.

R. R. Co. v. Swan, 111 U. S., 379.
McCormick v. Sullivant. 10 Wheat, 192.
Kempe v. Kennedy, 5 Cranch, 173.
Turner v. Bank of North America, 4 Dall, 330.

"Where the original jurisdiction of a Circuit Court of the United States is invoked upon the sole ground that the determination of the suit depends upon some question of a Federal nature, it must appear at the outset from the declaration or the bill of the party suing, that the suit is of that character. In other words, it must appear in that class of cases, that the suit was one of which the Circuit Court, at the time its jurisdiction is invoked, could properly take cognizance. If it does not so appear, then the court upon demurrer or motion, or upon its own inspection of the pleadings, must dismiss the suit just as it would remand to the State Court a suit which the record at the time of removal failed to show was within the jurisdiction of the Circuit Court. It cannot retain it in order to see whether the defendant may not raise some question of a federal nature upon which the right of recovery will finally depend; and if so retained the want of jurisdiction at the commencement of the suit is not cured

by an answer or plea which may suggest a question of that kind."

Metcalf v. Watertown, 123 U. S., 586.
Mining Co. v. Turck, 150 U. S., 138.
Press Pub. Co. v. Monroe, 164 U. S., 105.
Muse v. Arlington Hotel Co., 18 Sup. Ct. Reporter, 111.

In the case of Butler v. Shafer, 67 Fed., 161, involving a contention between a party claiming the right to make homestead entry upon a quarter section of land in Umatilla County, Oregon, and a party who was in possession of said quarter section, claiming the right to locate it as railroad land under an act of Congress, Judge Gilbert holds that because the complaint does not show that a dispute exists as to the meaning of the homestead laws, or of the act of Congress of Sept. 29, 1890, that "It is not shown that the complainant contends for one construction of a law of the United States and the defendants for another. It does not follow from any of the averments of the bill that the court will be required to give interpretation to said laws or to said act, or to any of the terms thereof. The substance of the bill is that the complainant has duly entered land under the homestead laws and is entitled to the possession thereof, and that the defendants are in possession of the same, claiming right of possession under the act of September 29, 1890, and that

their possession is wrongful, for the reason that they are not within the description of those whose rights are conserved by the provisions of the third section of the act. That is to say the defendants had no deed, written contract or license from the railroad company and they never were actual settlers upon the land. The trial of these questions involves only an investigation of the facts. It is contended by the complainant that the court will be called upon to decide what is the nature of the settlement upon railroad lands which is intended to be protected by the act. This does not appear from the allegations of the bill. On the contrary, the statement of the facts distinctly negatives such a conclusion. If it is true that the defendants are not in privity with the railroad company by deed, contract or license, and were not settlers upon the land, but resided elsewhere, the conclusion follows that their possession is without right; but in arriving at that conclusion there is not necessarily involved a construction of the language of the act. In order that the court may have jurisdiction, it is essential not that the complainant shall state that a Federal question exists, or that it will become necessary to construe a law of the United States, but that he shall state facts from which the court may see that such a question will be presented."

It cannot be maintained that any federal question is presented for determination by the bill itself, or that any con-

troverted facts or legal propositions of a federal character are therein set forth, upon which the Court might be called upon to pass its judgment. The only grounds upon which the jurisdiction of this court can be invoked in this class of actions are, that it is a suit brought under the provisions of Section 2326 of the Revised Statutes of the United States, and is within the rule laid down in the case of Frank G. & S. M. Co. v. Larimer M. & S. Co., 8 Federal, 724, and in the case of Cheeseman v. Shreve, 37 Federal, 36, and in the case of Strasburger v. Beecher, 44 Federal, 209, and lastly in the case of Burke v. The Bunker Hill Co., in the 46 Federal, 644, a decision rendered by the late Judge Sawyer, sitting in the District of Idaho.

In the case last cited we urged the jurisdiction of the Federal Courts in suits brought under Section 2326, and were sustained in our contention; but an examination of the opinion will show that it was a case transferred from the Territorial Courts of Idaho to the United States Circuit Court, upon the admission of Idaho as a State, and that the jurisdictional allegations were stated in the petition for removal; but this statement was considered by the Court as having the same effect as though it had been the statement of the Federal question in the plaintiff's original bill filed in the Territorial Court, upon the principle that the plaintiff could not be held to have been required to conform to the rules of the Federal Court in pleading in the Territorial Court, and the right of

removal being given by the Admission Act to cases which might have been brought in the Federal Court had Idaho been a state, the party seeking to remove the case to the United States Court, were entitled to supply the jurisdictional allegations in his petition, and in that case the Federal question was fully stated therein. Since the decision of the cases at circuit above cited the Supreme Court of the United States has had occasion to consider the question, in the case of Bushnell v. Crook Min. & Smelt. Co., thirteenth Supreme Court Reporter, page 771, 148 U. S., 688. In the syllabus of that case in the Reporter it is stated as follows:

"A suit in the State Court to try the right of possession of a mining claim and the right to a patent therefor, although it is brought in accordance with the Revised Statutes, Section 2326, does not necessarily involve a Federal question, so as to give a right of appeal to the United States Supreme Court."

The Court states in the decision that it was an action brought in support of an adverse claim under the provisions of Section 2326 of the Revised Statutes of the United States, and while several other questions are decided, upon some of which the plaintiff in error invoked the jurisdiction of the Supreme Court, yet the principal ground upon which they invoked the jurisdction, was that it was an action arising under the laws of the United States and especially under the

act of Congress of May 10, 1872. The Supreme Court in disposing of this question says:

"The decision of the Supreme Court of Colorado, in no way brought into question the validity or even construction of any federal statute and it certainly did not deny to the plaintiffs in error any right arising out of the construction of the federal statute. It was said by the Chief Justice in Cook Co. v. Calumet Canal Co., 138 U. S., 635-653: 'The validity of a statute is not drawn in question every time rights claimed under such statutes are controverted, nor is the validity of an authority, every time an act done by such authority is disputed.' "

There can be no question but that this decision in effect overrules the *doctrine* laid down in the several decisions of the Circuit Court on this question.

In the case of Burke v. The Bunker Hill Co., 46 Federal Reporter, 644, which was not a question of the original jurisdiction of the Circuit Court based on the sufficiency of the Bill, but was a case coming into this court under the act admitting Idaho as a state, the Federal question showing the contention regarding the interpretation and application of the act of Congress was set forth at length in the affidavit, and formed a part of the request for removal, and Judge Sawyer in rendering his opinion sets out that contention at length and gives it great weight in determining the question. But

in the case at bar, no Federal question is stated in the bill of complaint—no contention as to the construction of the law is herein set forth or intimated, nor is it alleged that there will be any contention, but only the question of fact involved, viz: Did the plaintiff or defendant, or their grantors, first make a valid location of the mining claim in controversy.

This is not a Federal question. Its decision does not necessarily turn upon the interpretation of any statute. The acts of location are clearly defined. The law requires that the locator shall be a citizen, or have declared his intention to become such. That he shall make a discovery of a ledge of valuable mineral bearing rock in place. That he shall mark his claim upon the ground so that its boundaries can be readily traced, and that where he makes a record of his location, that record shall contain certain statements. Whether or not these things are done is a question of fact to be determined by the jury, as is provided in the act of March 3, 1881. If he proves them he is entitled to a patent, if he fails to do so his application will be denied.

Judge Gilbert, presiding in the Circuit Court of Appeals in the Ninth Circuit, dissented from the judgment of the Court here appealed from on this question, and his dissenting opinion will be found in the 87 Federal Reporter, at page 808. He concludes that no question of Federal cognizance is presented by the plaintiff's bill, and that there being no

diverse citizenship or other jurisdictional ground upon which the Circuit Court might take jurisdiction of the case, it should have been dismissed, upon the authorities heretofore cited.

The United States Circuit Court has not jurisdiction of this action, either because of diverse citizenship of the parties or because of the character of the questions involved therein.

EQUITY JURISDICTION.

The first question that presents itself for our consideration in all actions on the Equity side of this Court, is that of the jurisdiction of the Court to entertain such action. By the Constitution of the United States and by the Act of Congress organizing Federal Courts and defining and investing the jurisdiction of these tribunals, the distinction between common law and Equity jurisdiction has been explicitly declared and carefully defined and established. Thus in section 2 of article 3 of the Constitution, it is declared that "the judicial power of the United States shall extend to all cases in law and equity arising under this Constitution, the laws of the United States," etc.

In the Act of Congress "to establish the judiciary of the United States" this distribution of law and equity appears and is frequently referred to, and by the 16th section of the

Judiciary act, which is Section 723 of the Revised Statutes of the United States, it is provided that:

"Suits in Equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law."

The constitution has declared in the third article that the judiciary power shall extend to all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made under their authority, &c. It is well known that in civil suits, in courts of equity and admiralty, juries do not intervene, and that courts of equity use the trial by jury only in extraordinary cases. When, therefore, we find that the 7th amendment to the Constitution requires "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law," the natural conclusion is that the distinction was present in the minds of the framers of the amendment. By *common law* they meant what the Constitution denominated in the 3rd article law, not merely suits which the common law recognizes among its old and settled proceedings, but suits in which *legal rights* were to be ascertained and determined in contradistinction to those where

equitable rights alone were recognized and equitable remedies administered.

Parsons v. Bedford et al., 3 Peters, 446.
Fenn v. Holme, 21 Howard, 486.
Strother v. Lucas, 6 Peters, 768.

The first assignment of error is based on the demurrer to the plaintiffs' amended bill, "That it appears on the face of the bill that the plaintiff has an adequate remedy at law."

The bill alleges that the plaintiffs are the owners of the premises sought to be recovered and that they are in possession of the same, that the defendant has filed its application for patent in the United States Land Office (this is really the original pleading in the controversy over the title to this mining ground, Wolverton v. Uichols, 119 U. S., 488). The complaint then alleges "that in and by said application for "patent, "the defendant sets up and wrongfully alleges that it was the "owner *and in possession* of the whole of the 'Shoshone' min- "ing claim, inclusive of the premises sued for . . . and "of the lode therein."

Thus we find in the bill that both parties claim to be in possession. The proofs at the trial showed both parties to be in possession. There is no allegation in the complaint that the defendant is not in possession or that its allegation in the application for patent that it is in possession is not true.

The possession, where possession is material to maintain the jurisdiction of a U. S. Court of Equity in an action to quiet title must be complete; partial possession is not sufficient.

Northern Pacific R. Co. v. Amacker, 46 Fed., 233.
Northern Pacific R. Co. v. Cannon, 46 Fed., 224.

In considering the title to a mining claim, in a proceeding for a patent, the question of possession is immaterial. Title does not flow from possession, but must rest on a valid location.

Belk v. Meagher, 104 U. S., 279.

But this is a special proceeding under the provisions of Section 2326, U. S. Revised Statutes, and may be said to be neither law nor equity. It must be conceded, however, that the Statutes of Idaho make adequate provisions under Chapter 3, Title 10, of the Revised Statutes, for the determination of this class of controversy.

Section 4538 in said chapter provides, "An action may be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claim."

Under Section 16 Revised Statutes of Idaho, mining claims are real estate.

The Supreme Court of Idaho, in interpreting this Statute in Burke v. McDonald, 13 Pacific Reporter, 351, says: "We understand that an action to determine the right of possession as authorized by this act is in this Territory an action at law. If so the appellants were entitled to a jury and the court erred in holding the case was a suit in Equity and in denying the right to a jury trial."

The law of Idaho on this subject remains unchanged since this decision.

This interpretation of the Statute of Idaho by the Supreme Court of that State is conclusive and binding.

Duncan v. McCall, 139 U. S., 449.
Miller v. Anderson, 150 U. S., 132.
Morley v. Lake Shore & M. S. R. Co., 146 U. S., 162.

The decision of the State Supreme Court as to the form of action maintainable under its Statutes, is binding on the United States Supreme Court.

Wood v. Brady, 150 U. S., 18.
Lowndes v. Huntington, 153 U. S., 1.

The principle upon which Courts of Equity assume jurisdiction is that there is no adequate remedy at law. This does not necessarily mean that there is no adequate remedy at law in some particular court, but it must appear that there was

no such remedy in any court available to the party, in which his legal rights could be adjudicated and determined. It will not be questioned but that the State Courts of Idaho had jurisdiction to determine actions brought in support of an adverse claim, nor will it be contended that the Courts of Idaho could not determine this question on the law side of such courts, or that under the decision of the Supreme Court of Idaho in the case of Burke v. McDonald, 13th Pac. Reporter, 351, interpreting the law of that state, such actions would be at law and the parties entitled to a jury trial. In view of these facts, can a party seek to avoid a trial of the controversies in an action at law before a jury, in the State Court, and bring his action in the Courts of Equity of the United States, and claim that he does so because that under the laws of the United States, and the rules of its courts, a party cannot maintain an action at law therein to determine the title to real property of which he is in possession and that therefore such action is on the Equity side of the Court?

I think that the rule is, that a court of Equity will not assume jurisdiction of a controversy, if the party has any adequate remedy at law in any court competent to determine the issue.

In Federal Courts, both because of the defendant's Constitutional right to a trial by jury, and because of the prohibition of the Act of Congress to pursue the remedy in law cases

in a Court of Equity, suits not of an equitable cognizance are strictly confined to the law side of the Court.

Daniels Chan. Prac. 6th Ed. p. 1066.
Scott v. Neely, 140 U. S., 106.
Lewis v. Cocks, 23 Wall., 470.
Killian v. Ebbinghaus, 110 U. S., 573.
Buzard v. Houston, 119 U. S., 351.

The case of Perego v. Dodge, 163 U. S., 160, is relied on as authority for the position assumed by respondent that where the plaintiff is in possession the action against one setting up an adverse claim will be in Equity, but that case turned, so far as the question as to the form of action was involved, upon the fact that the appellant had himself chosen the form of action and could not therefore be heard to demur to his own complaint or to object to the jurisdiction to which he had appealed after it had decided adversely to him. The expression found in the opinion on page 165 is suggestive of the rule in the instance cited under the statutes of Utah. It must be borne in mind that the case of Perego v. Dodge was not a case in which the original jurisdiction of a Circuit Court of the United States was involved, but only a question of the jurisdiction of a Territorial Court of Utah regulated by the Legislative enactments of that Territory.

Ely v. New Mexico &c. R. R. Co., 129 U. S., 292.

The prohibition of the sixteenth section of the Judiciary Act of 1789, 1 Stat. 82, Ch. 20, as incorporated in the Revised Statutes of the United States, Sec. 723, did not apply to the Territorial Courts of Utah. The question of the original jurisdiction might be one of selection by the plaintiff as between law and equity under the Statutes of Utah in the Territorial Court, but it is not determined by the choice of the plaintiff in selecting his form of action in the Courts of the United States. The question in those courts is to be determined by the rules of law and of the Courts, and the test to be applied is stated in the case of Hipp v. Babin, 19 Howard, 271, to be "That whenever a court of law is competent to take cognizance of a right and has power to proceed to a judgment, which affords a plain, adequate and complete remedy without the aid of a Court of Equity the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury."

Parker v. Winnipiseogee L. C. Co., 2nd Black, 545
Grand Chute v. Winegar, 15 Wall., 373.
Lewis v. Cocks, 23 Wall., 466.

In support of our contention that the question of who is in actual possession of the mining claim in controversy has not controlled the form of the actions brought in the United States Courts under Section 2326 of the Revised Statutes of the United States in the past, I call attention to the records

of cases of this class which have been decided by those Courts.

I have carefully examined all of the cases that have been considered and decided by the Supreme Court of the United States brought in support of adverse claims under Section 2326 of the Revised Statutes of the United States. And with the exception of O'Reilly v. Campbell, appealed from Utah and reported in the 116 U. S., 418; Chambers v. Harrington, appealed from Utah, reported in the 111 U. S., 350, and Eilers v. Boatman, appealed from Utah and reported in the 111 U. S., 356, every case has been an action at law. The Supreme Court of the United States has therefore found that a court of law, to use their own language: "Is competent to take cognizance of the right and has the power to proceed to judgment, which affords a plain, adequate and complete remedy without the aid of a Court of Equity," and this, regardless of the question of the possession of the plaintiff.

From an examination of these Utah cases, in the report of the same in the Territorial Supreme Court, it will appear that they were not suits in Equity. Harrington v. Chambers, was a statutory action under the law of Utah and was referred to P. L. Williams, under a stipulation between counsel, to take the testimony and report findings of fact and conclusions of law, and the referee made such findings of fact and conclusions of law and the case was heard in the Territorial Supreme Court and in the United States Supreme Court,

upon such findings and conclusions. In the Territory of Utah at the time of the trial of these cases there was no United States Court in which they could have been tried. They were tried in the Territorial Court under the rules of procedure established by Territorial Statute, in which the distinction between actions at law and in Equity was abolished, and the cases were tried without a jury by agreement of counsel. The Supreme Court of Utah makes this perfectly plain in Houtz v. Gisborn, 1 Utah, 173, where they say that "under Utah code there is no such thing as a chancery proceeding separate and distinct from a legal proceeding." And thus under the provisions of the Act of Congress of April 7, 1874, entitled, "An Act concerning the practice in the Territorial Courts and appeal therefrom," which especially recognized the right of the Territorial Legislature to abolish the distinction between Courts of Law and Equity, and to mingle such jurisdiction, and providing that the review of the judgment of the Supreme Court of the Territories should be by writ of error where cases were tried by jury, and by appeal where the cases were tried without a jury, these cases came into the Supreme Court of the United States on appeal, thus making them appear on the face of the record to have been on the Equity side of the Court below, but an examination of the cases as reported in the Court below will disclose the fact that they were not suits in Equity, but were tried under the Territorial Act abolishing the distinction between the Courts of Law and

Equity, and were brought as special proceedings under which the right of trial by jury was preserved by the terms of Section 1 of said Act of Congress, which right the parties might have demanded, but in these three cases appealed from Utah the right was waived and thus the cases went in by appeal instead of writ of error.

This leaves the record of the United States Supreme Court absolutely clear on this question between equitable and legal jurisdiction of suits of this kind. No suit in Equity brought in support of Section 2326 of the Revised Statutes of the United States has ever been before, or passed upon by the Supreme Court of the United States.

Jackson v. Roby, 109 U. S., 440.
Richmond Min. Co. v. Rose, 114 U. S., 576.
Gwillim v. Donnellan, 115 U. S., 45.
Hoyt v. Russell, 117 U. S., 401.
Manuel v. Wulff, 152 U. S., 505.
Larkin v. Upton, 144 U. S., 19.
Wolverton v. Nichols, 119 U. S., 485.
Kendall v. San Juan S. M. Co., 144 U. S., 658.

There are but two cases reported in the Federal reports which were brought on the Equity side of the Court, viz: "The case of Doe v. Waterloo Min. Co., 43 Fed., 219, and Preston v. Hunter, 67 Federal, 996, unless the suit of the

Montana Cent. v. Migeon, reported in the 68 Fed., 811, may be so termed. The record does not disclose the nature of the action, only that it was tried by a court without a jury. The cases of Doe v. The Waterloo and Prestion v. Hunter have both been affirmed in the Circuit Court of Appeals of the Ninth Circuit, but the question of the right to bring suit on the Equity side of the Court was not considered by that Court in either case. The question does not appear to have been raised so far as the record shows in any of these cases, except in Doe v. The Waterloo before the Circuit Judge, and no appeal appears to have been taken from his ruling thereon.

Courts of Law and Courts of Equity are not Courts of concurrent jurisdiction. Whenever a Court of Law is competent to take cognizance of the right and has power to proceed to judgment, which affords a plain, adequate and complete remedy, without the aid of a Court of Equity, a Court of Equity can have no jurisdiction. If the Court of Law did not possess the power and was not competent to dispose of these questions, how is it that in all of these actions at law, brought for the purpose of determining such adverse claims, which have been decided by the Supreme Court of the United States, no difficulty has been experienced as to the competency or adequacy of the Court to grant the relief contemplated by Section 2326 of the Revised Statutes? In some of these actions, which have been thus passed upon, the plaintiff

has been in possession and in others the defendant has been in possession. The actions have been treated as special proceedings under the statute, and the question of possession has been passed over as immaterial, so far as determining the form of action.

Every adverse suit that has been tried in the United States Circuit Court in the District of Colorado has been on the law side of the Court.

So far as the form of action is concerned, it makes no difference who is in or out of possession. The proceeding is simply to determine which party, if either, is entitled to a patent, and in such cases, where the claim is asserted under a location, actual possession is not a material question.

Burke v. McDonald, 13 Pac., 351.

Manning v. Strehlow, 18 Pac., 627.

In the case of Lee Doon v. Tesh, 8 Pac., 622, the Supreme Court of California in considering a case brought under this Act of Congress, says:

"The action is not brought to recover possession of the property or damages for a trespass thereon, or to quiet title thereto, but is a special action to determine the right of possession preliminary to purchase from the United States."

In Steel v. G. & S. Min. Co., 18 Nev., page 87, Hawley,

Chief Justice, says, in considering the same question:

"These actions may be brought by the plaintiff, whether he is in or out of possession of the mining ground in controversy and the only sensible construction of the law is, that each party must prove his claim to the premises in dispute and that the better claim must prevail." Citing Golden Fleece Co. v. Cable Co., 12 Nev., 321. This was an action at law.

The law side of the United States Circuit Court was competent to take jurisdiction of the case at bar and to dispose of it. Are there any features of this case which distinguish it from that of Wolverton v. Nichols, and the many other "adverse suits" brought under Section 2326, in which Courts of Law did dispose of the question "of the right of possession," and determine which party was entitled to a United States patent? We are forced to the conclusion that a Court of Law is competent to dispose of the issues in this class of cases, the United States Supreme Court having repeatedly recognized the sufficiency of the Courts of Law, both state and national, to dispose of such cases.

Let us examine the Bill for a moment. The allegations are, that they own a mining claim, which under the laws of Idaho is real estate. That their title to it is a legal title. The Court will take notice of the fact that this legal title can be established only by proof the performance of the acts re-

quired by the Act of Congress, viz: The acts of location, recording, etc. There is nothing in connection with the establishment of this kind of title that calls for the aid or interposition of Equity. The object of this action is to establish the existence of a title, not to quiet an established title. If the plaintiff establishes such title, that is the end of the case, and he is entitled to patent. If he fails to establish it, Equity could not help hm. The title is legal; the proofs to support it are of a legal nature also. He alleges that the defendants have done or are doing certain acts which cloud his title, but he alleges the nature and character of those acts, and from an inspection of them we find that they are not such acts as constitute a cloud upon title, but involve a contest for title under the Statute. The Court, in Belk v. Meagher, 104 U. S., holds that title comes from a valid location only. A compliance with the law regulating the location of a mining claim consists in the performance of certain acts. If the party performs those acts and is a qualified locator, he has title—legal title; not an equitable title. And the provision of the Statute of the United States, that no possessory action between individuals in the Courts of the United States for the recovery of mining titles should be affected by the fact that the paramount title of the land was in the United States, but that each case should be adjudicated by the law of possession does not affect this rule. This would seem to settle beyond all controversy the character of the title held by the locator. If they

relied upon equitable title, the Courts of Equity would be open to them. When they rely upon a legal title it must be determined in the Courts of Law.

It is held in Lewis v. Cocks, 23 Wall., 466, that if the Courts upon looking at the proofs find none at all of the matters which would make a proper case for Equity, it would be the duty of the Court to recognize the fact, and give it effect, though not raised by the pleading nor suggested by counsel. To the same effect is Oelrichs v. Spain, 15 Wall., 211.

"KIRBY" GROUND NOT SUBJECT TO LOCATION.

It is claimed that on the 11th day of July, 1886, the ground covered by this location was vacant and unoccupied mineral lands of the United States subject to location. The first witness that plaintiffs placed on the stand with reference to the "Kirby Fraction" location, was Jacob Johns, one of the locators. He testified both on direct and cross examination, that at the time of the location of the "Kirby Fraction" claim the ground had already been located as the "Edith" mining claim, and that the said "Edith" location had not been abandoned. He says in his testimony at page 14, "We located one claim over the top of the other." At page 20 of his testimony, he says: "We located the 'Edith' first

and located the other over it afterwards; that the 'Edith' had been staked and located on the ground first; that this was some time in June." The location notice of the "Edith" is then submitted to the witness, and after examining it, he testifies that this location notice was made and recorded for the "Edith" claim, and that the location was completed before the location of the "Kirby Fraction"; that the discovery points were close together; that they never abandoned the "Edith" location and never intended to abandon it; that they located the "Kirby Fraction" over the top of the "Edith," but did not intend to abandon the "Edith"; that they had the same character of discovery on the "Edith" that they had on the "Kirby Fraction."

In conveying this property, we find in every instance up to the time that Mr. Rutter conveyed to Mr. Bradley, the "Edith" location was recognized and conveyed. This brings the location of the "Kirby Fraction" within the rule laid down in Belk v. Meagher, 104 U. S., page 279. If the "Edith" location was a valid one, then the ground where the "Kirby" discovery is claimed to have ben made was not vacant or subject to location, and the "Kirby" location was a nullity. The testimony of Johns, in regard to the location of the "Edith" and "Kirby" claims, is fully substantiated by that of Sullivan, the other locator, who testified that they never intended to abandon the "Edith," but always recognized it as the location under which they claimed.

Nor can Mr. Rutter be heard to contend that the "Edith" location was abandoned. He has offered in evidence three deeds to himself, each reciting the "Edith" location, and these deeds were made long subsequent to the time when it is claimed the "Kirby" was located. Mr. Rutter can claim nothing so far as the "Kirby" title is concerned by virtue of being an innocent purchaser, or by virtue of any deception practiced upon him by his grantors, because the deeds to him gave him full notice of the "Edith" title and of the invalidity of the "Kirby" location.

Neither can Mr. Bradley claim anything as an innocent purchaser, as against the "Edith" title, because all of the deeds of his grantors under which he claims recite the fact of the "Edith" location.

The plaintiffs cannot recover in this action by reason of the fact that they are owners of the "Edith" title. They have not relied upon that title in adversing the "Shoshone" in the Land Office. They have filed no plat showing any conflict between that claim and the "Shoshone." They have no abstract of title of that claim. They have made no protest on behalf of it against the application of the defendant for patent. They have set up no title to that claim in their Bill of Complaint in this action. There is no issue joined as to the validity or invalidity of the "Edith" location. The fact that there is an identity of locators as between these two claims

cannot help the plaintiffs in this action, as it is the mining claim that is contesting the application of the defendant for patent and not the owners, except incidentally.

Weill v. Lucerne Mining Co., 11 Nev., 200.

If, therefore, the testimony of those locators is to be believed, when they testified that they had on the 10th day of June, 1886, located the "Edith" claim, upon the ground in controversy, and that a month later, in July, without any intention of abandoning the "Edith" location, they had sought to locate another claim, called the "Kirby" based upon a discovery within the lines of the "Edith" then the location of the "Kirby" is a nullity, and the plaintiffs cannot recover in this action upon that title, nor can they defeat the application of the defendants in the Land Office by interposing the "Kirby" title against it.

The only possible chance for the plaintiffs to sustain the "Kirby" title must rest upon their ability to show an abandonment of the "Edith" before the location of the "Kirby"

(EDITH LOCATION.)

In the case of Golden Terra Min. Co. v. Mahler, et al., decided by the Supreme Court of Dakota, reported in the 4th Morrison, page 390, it is held that if two locations of mining claims are made by the same party which interfere with

each other, the scond location includes only so much ground as is exclusive of the first, and if the discovery of the second is within the boundaries of the first location, such second location is invalid, for it is a condition precedent to the location of a mining claim that the discovery of a vein bearing valuable minerals shall first be made within the limits of such location independent of any other subsisting and valid location. It is upon the public mining lands that the vein must be discoverd.

This decision seems to be squarely in point on the proposition under consideration, and completely meets and refutes the position assumed by counsel for plaintiffs, that because there was an identity of locators of the "Edith" and "Kirby" claims, that it is no concern of the outside world under which title they shall claim the ground. We insist that the location of the "Edith" having segregated the ground from the public domain, that the location of the "Kirby" was invalid.

WAS THE "EDITH" ABANDONED PRIOR TO THE LOCATION OF THE "KIRBY."

The terms "forfeiture" and "abandonment" are not synonymous. The first depends upon acts alone, the second

largely upon intention. In the first intention is immaterial, in the second it is everything.

Park v. Heatin, 4th Mor., 447.
St. John v. Kidd, 4th Mor., 454.
Mallett v. Uncle Sam G. & S. M. Co., 1st Mor., 17.

Whether or not a mining claim has been abandoned, is a question of intent.

Waring v. Crow, 5th Mor., 204.
Bell v. Bedrock M. Co., 1st Mor., 45.
Marenhaut v. Wilson, 1st Mor., 53.
Stone v. Geyser M. Co., 1st Mor., 59.
Meyer v. Spooner, 9th Mor., 519.
Taylor v. Middleton, 67 Cal., 656.
Derry v. Ross, et al., 5th Colo., 295.
Omar v. Soper, 18 Pac., 443.
Weill v. Lucerne M. Co., 3rd Mor., 372.

The next inquiry which arises is as to the source from which we shall gather evidence of intention to abandon.

In this case one of the locators is dead. The only evidence of his intent in the matter is to be gathered from the deed which he executed to Rutter, one of the plaintiffs. In this deed he recites the "Edith" location and conveys it. The locator Charlebois appears to have taken no active part either in the location or holding of the two claims. It is not

shown that he was ever on the ground, and we have no act or word of his from which to gather information as to his intention. The locator Johns testifies for the plaintiffs, that the "Edith" was the first location. That the locators had no intention of abandoning it at or before the time of the location of the "Kirby." That the "Kirby" was located only for the purpose of taking in more ground, and it would seem from his testimony that they did not know that the location of the "Kirby" based upon a discovery within the lines of a claim already located would be void. This locator Johns also conveys the "Edith" location as though it were an existing valid claim about a year after the location of the "Kirby." These are the acts and declarations from which his intention may be gathered. The other and only remaining locator is Sullivan, who seems to have actively participated in the location of these claims. He testifies that the "Edith" was the first location; that the locators of the claims had no intention of abandoning it at or before the time of the location of the "Kirby"; that the "Kirby" was located only for the purpose of taking in more ground, and it would appear from his testimony that he did not know that a location made upon a discovery within the boundaries of an existing claim would be void. He testifies unequivocally that they had no intention of abandoning the "Edith" claim or location. He also by deed, made long after the location of the "Kirby Fraction," conveys the "Edith" claim in connection with the "Kirby

Fraction." We must, therefore, look further for evidence of intention to abandon the "Edith" location on the part of any person competent to act in the matter. It doesn't make any difference as to what Mr. Rutter's intention was at the time he deeded to Mr. Bradley nor what Mr. Bradley's intention was, nor does it make any difference what the intention of the original locators, either of the "Edith" or of the "Kirby" may have been subsequent to the location of the "Kirby"; the question is as to the status of this ground at the time of the location of the "Kirby."

A subsequent failure of title, or abandonment of the "Edith" after the attempted location of the "Kirby" would not validate the "Kirby" location.

Oscamp v. Crystal River M. C., 58 Fed., 293.
Omar v. Soper, 11th Colo., 380, 18th Pac., 443.

The location of the "Kirby" to entitle the plaintiffs to prevail in this action must have been good and valid at the time it was made—it must have been made upon lands subject to location under conditions authorizing such location.

Belk v. Meagher, 104 U. S., 279.

In adverse proceedings the defendant may defeat the plaintiffs' claim by showing that plaintiffs' location was upon

land not subject to location, having been included within the exterior limits of an existing claim.

Girard v. Carson, 44 Pac., 508.

Upon the showing of the plaintiffs, the location of the "Kirby" was void, for the reason that the ground was not subject to location at the time when it is claimed the "Kirby" was located.

WAS THE "KIRBY FRACTION" A VALID LOCATION.

In deciding this question the Court says: "Were it required that the evidence should remove all reasonable doubt I should answer this question in the negative, but under the liberal rule that prevails as to the constitution of a ledge within the law, I think the preponderance of evidence is in favor of such a discovery." (Transcript, p. 70).

The Court later says: "It has also been suggested that thus far the plaintiff's ledge has not been proven a valuable one—that is not necessary, if it is sufficient in the beginning to justify a location, *which I have reluctantly held*, it is sufficient for all time, even if it never becomes valuable."

I think we may safely say that the court shows decided dissatisfaction with its conclusion in this case so far as the title of the "Kirby Fraction" is concerned. The Court says: "Just when this discovery was made, I have not taken time to determine from the testimony except that it was before the locaton of the "Shoshone." While I personally feel that any location of a mining claim, made before the discovery of a vein or lode within its limits should be held void *ab initio* such opinion must yield to what is deemed the preponderance of authority." (Transcript, page 71).

The "preponderance of authority" relied upon in support of this conclusion is distinguished rather by its "oft repeated assertion" than by the binding authority of the tribunal announcing it. The question has been before the Supreme Court of the United States but once, in the case of Larkin v. Upton, 144 U. S., 19. The suit was one brought in support of an adverse claim and was tried by a jury, which decision must be considered in connection with the report of the case below. The case was first before the Supreme Court of Montana on the sole question of whether a location made before a discovery would be validated by a subsequent discovery.

Upton v. Larkin, 5 Mont., 600.

The Supreme Court of Montana gives the question full consideration and holds that a location void for want of dis-

covery is not rendered valid by a subsequent discovery and meets every argument advanced against that conclusion in this case. The question was again before the Supreme Court of Montana on second appeal. (7th Montana, 449). The same question was up for decision and the Court gives additional force to its former conclusion.

The Court says: "The next error specified is that one of the defendants, Larkin, was not allowed to testify as to the width and richness of the vein, as shown by work subsequent to the location of the Smelter lode. We think that the objection was properly sustained. Whether or not the defendants were entitled to recover depended upon discovery before location. No discovery made after location would make that location valid."

The case of Jupiter Mining Co. v. Bodie, relied on by respondents, is discussed and criticised on page 602, 5th Mont., and the whole question is thoroughly and completely disposed of upon authority. When the case came before the Supreme Court of Montana the second time as reported in the 7th Mont., page 449, this same question came up together with certain other questions.

This case then went to the Supreme Court of the United States and is reported in 144 U. S., page 19. The decision is rendered by Justice Brewer, and is the unanimous opinion of the Court. Justice Brewer in the statement of facts, says

that the case was reversed by the Supreme Court of Montana on the ground that there had been no discovery of a vein or lode within the "Comanche" territory *at the time of the location of the claim*. He then recites the fact that the contest on the second trial was as to the position of a discovery shaft and of the apex of the vein disclosed by it, on the boundary between the "Comanche" and "Shannon" claims, and that the testimony of the defendants tended to show that it was wholly on the "Shannon" claim, and that of the plaintiffs that it was partly on both claims. It seems to have been considered necessary that the "Comanche" should own a part of that shaft inasmuch as whatever discovery there was, was in the shaft and the "Comanche" could only recover upon establishing the fact that at the time of or prior to its location, it had discovered the apex of the lode in that shaft. The Court beyond any question, considered that the vital question upon which the case turned, and that he approves the doctrine laid down by the Supreme Court of Montana, both upon the first and second trials, wherein they held that the discovery must be made before location seems not open to doubt. The verdict in the case was in favor of the plaintiffs upon both trials. The plaintiff won solely upon the ground that the defendant had not discovered a lode prior to the making of the location.

In the case at bar the testimony of the locators shows that no discovery was made upon the "Kirby Fraction" prior

to or at the time of the location of the claim, but they claim that a discovery was made long subsequent to such location but prior to the location of the defendant's claims, and asked the court to hold that this subsequent discovery validated the location.

The question as to whether or not a subsequent discovery would make good a location that was void for want of discovery was before the United States Circuit Court in the case of Van Zandt vs. The Argentine Min. Co. reported in the 2d McCrary, page 159, affirmed in 122 U. S., 478.

In that case it is held, "Under the statutes Federal and State, no location of a mining claim shall be made until the discovery of a vein or lode within the limits of the claim; and a discovery shaft must be sunk thereon to the depth of at least ten feet. The mineral or ore so discovered must be in position in the form of a lode and not in a broken and fragmentary condition, intermingled with slide and debris on the surface. *Discovery of ore after location* in a different part of the claim *will not avail.*"

"The burden is on the plaintiff to establish the fact that ore was so found in his discovery shaft, and that the same lode is continuous to the ground in controversy."

I quote from the syllabus which is fully borne out by the opinion.

Section 2320 of the Revised Stat. of the U. S. provides that "no location of a mining claim shall be made until the discovery of a vein or lode within the limits of the claim located."

This language is so explicit that it can need no interpretation other than the direct application of the principle therein stated to the facts. It is mandatory in character, both in the letter and spirit of its provisions. From its position in the section it was evidently an amendment made for a specific and definite purpose. It is right in principle. The United States Supreme Court in the case of Gwillim vs. Donnellan, 115 U. S., 45, Belk vs. Meagher, 104 U. S., 279, have said that a valid location duly made has the effect of a grant by the United States to the right of present and exclusive possession. That it segregates the ground located from the public domain, and exempts it from the operation of the license given by the mining statutes to the prospector. It was the manifest intention of Congress that this segregation should not take place, that this exclusion of the prospector should not be effectual, until in the language of section 2320 "the discovery of a vein or lode within the limits of the claim located."

If the principle contended for by plaintiffs that a locator could by marking the boundaries of a claim upon the ground and recording a notice of location in effect segregate the land included from the public domain and exclude prospectors

therefrom until he should at some subsequent period discover within the enclosure a lode or vein, is to be maintained by the Courts, then that portion of section 2320 becomes inoperative and the location of a mining claim instead of being something definite and certain would be simply an experiment on the part of the prospector to be worked out at his leisure. If he can hold the claim and exclude others from it for a day he can do so for an indefinite time, because, under the law, when he has staked his boundaries and recorded his claim he is entitled to the exclusive possession of that ground, and no opportunity can exist for any other prospector to make a discovery within the limits of the claim, without being liable as a trespasser. This would result in covering the country with bogus locations made for the purpose of excluding others until such time as the experiment of determining whether or not a lode existed in the claim should be worked out by the locator.

The respondents contend that if a locator, not having made a discovery at the time or prior to his location, made one afterward, before the rights of third persons intervene, that his location is thereby made good as of the date of the original claim, and cites and relies upon, Strepey vs. Stark; Jupiter Mining Company vs. Bodie; Zollars & Terra vs. Smith; Patchen vs. Kelly, and McEvoy vs. Hyman.

I desire to review the facts of these several cases some-

what in detail that we may see just what was decided in each of them.

In Strepey vs. Stark, 7 Col., 614, the first case cited by plaintiff's counsel, the question was as to whether or not the locators of the "Negro" lode sunk their shaft ten feet deep within the time required by the laws of Colorado. It appears from the Statement of Facts in this case, page 615, that they established the fact of the discovery of mineral and contended that they sunk a shaft of over ten feet deep. The claimants of the "Little Bell" contended that in 1880 when they went upon the ground this cut which the locators of the "Negro" had made was but four or five feet deep and that they sunk it to the depth of fifteen feet and took out mineral and located it. The Court says at page 618:

"Under the law four certain things are to be done in order to perfect a location. First, the sinking of a discovery shaft upon the lode ten feet in depth or deeper if necessary to disclose mineral in place."

This statement of the Court presupposes the discovery of a lode because it says that the requirement is to sink a shaft upon the ledge ten feet deep or deeper if necessary to disclose the mineral in place. The question here, was not as to the discovery of the lode prior to the location of the claim as required by the Act of Congress, but as to the necessity of com-

plying with the local laws of Colorado with reference to the performance of certain work as a preliminary to the location. The laws of Colorado are not the basis of the grant to the locator. There is no title resting in the State of Colorado of which it may dispose. The Act of Congress requiring the discovery of a lode is mandatory. The respondents contended that the appellee had not performed these various acts required by the laws of Colorado to be done after the discovery, within the time prescribed by the Statutes of Colorado, but it seems to be admitted that they were performed before the entry of the respondents. The Court held that that was sufficient to sustain the appellee's title.

I think we may, therefore, safely say, that the case of Stepey vs. Stark, does not sustain the contention that a location may be made before discovery and cured by subsequent discovery, which will relate back to the original date of location.

The next case relied upon by plaintiff is the Jupiter Min. Co. vs. Bodie, 4th Mor., 411. This is by Judge Sawyer, and is contained in a charge given to a jury. The same weight is not to be attached to these expressions of a judge as are given to those of an appellate court sitting to determine the law with that deliberation which an appellate court is enabled to give, as distinguished from a hurried consideration given to these questions by a judge in charging a jury, but in this

case, the principal contention was as to the identity of a lode claimed in an adjacent location, one being called the "Actaeon" and the other the "Fortuna." Another question involved was as to whether or not the proper apex of this vein was within the side lines of one of the plaintiff's claims drawn vertically downward. The Court instructed the jury as to what was necessary to constitute a discovery and location. On page 422 he recites the provisions of Section 2320 with reference to the necessity of discovering a lode prior to the location and says: "The Statutes also provide: Gentlemen of the jury, that 'no location of a mining claim shall be made until the discovery of a vein or lode within the limits of the claim located,' and further says that no rights can be acquired under the Statute by the location made before the discovery of a vein or lode within the limits of the claim located; that a vein or lode authorized to be located is a seam or fissure in the earth's crust filled with quartz or with some other kind of rock in place carrying gold, silver or some other valuable mineral deposit named in the statute. It is not enough to discover detached pieces of quartz or mere bunches of quartz not in place. The vein, however, may be very thin or it may be many feet thick or thin in places—almost or quite pinched out, in miner's phrase—and in other places widening out in extensive ore bodies. So, also, in places it may be quite or nearly barren, and other places immensely rich. It is only necessary to discover a genuine mineral vein or lode whether small or

large, rich or poor, at the point of discovery within the lines of the claim located, to entitle the miner to make a valid location including the vein or lode. It may and often does require much time, labor, care and expense to develop the vein or lode after discovery and location sufficient to determine whether there is really a valuable mine or not, and the location would be necessary before incurring such expense in developing the vein, to secure to the miner the fruits of his labor and expense, in case a rich mine should be developed. If then the locators of the "Lucky Jack" discovered such a mineral vein or lode as I have described, however small, before the location of that claim the location of the claim embracing within its lines the vein or lode so discovered was in this particular valid, otherwise not."

The Court then instructed the jury that having heard the testimony on this point, it was for them to determine the fact. The jury is then further instructed that it is not necessary that the locator should be the first discoverer of a vein, but it must be known to him and claimed by him in order to give validity to the location.

We now come to the portion of this decision upon which plaintiffs rely in support of their contention that a subsequent discovery makes good a location void for want of discovery and the language of the Court is as follows:

"I instruct you further that if a party should make a loca-

tion in all other respects regular, and in accordance with the laws, rules, regulations and customs in force at the place and at the time upon a supposed vein, before discovery of the true vein or lode, and did sufficient work to hold the claim, and after such location should discover a vein or lode within the limits of the claim, before any other party had acquired any rights therein, from the date of his discovery his claim would be good to the limits of his claim, and the location valid."

This must be read in connection with that part of the instructions immediately preceding it, which I have already quoted.

The Court used the term "supposed vein," and "true vein." Under the facts as they are stated in the instructions there had actually been a discovery of that which led to ore in this case. The law allows a valid location to be made upon "such indications of the existence of a vein as a miner would follow with the expectation of finding ore."

This doctrine was established in the case of Harrington vs. Chambers by the Supreme Court of the United States. Applying this rule to that portion of the instructions relied upon by the plaintiffs in this case we find that what the locators of the "Lucky Jack" actually did discover, proved upon development to be a vein, and the question before the jury was

whether or not this demonstration of an existing fact must be made before location or might be made afterward. We do not contend that the discovery of the vein must be developed to the extent of disclosing the fact that it is a "main vein," or that it is a "paying vein," but we do contend that a miner must discover that which he can follow and find ore, and that this discovery must be prior to the location of his claim. There is nothing in the instructions given by Judge Sawyer to the jury relied upon by plaintiffs to support their general statement that a subsequent discovery will give validity to a void location.

The next case relied on by plaintiffs is that of Zollars vs. Evans, 4th Mor. 407, which also consists of instructions to the jury by Judge Hallett. I would make the same suggestion as to the weight to be given to this kind of an authority as distinguished from one which is a deliberate judgment of a Court of Review.

The Court instructed the jury that they must find as to the discovery in the "Highland Mary" discovery shaft and whether it extended from that discovery shaft to the ground in controversy. The "Highland Chief" people had sunk a shaft just outside of the ground in dispute, and had run drifts from their shaft into the ground in dispute. The controversy was as to the ground outside of the point of discovery of both claims and involved the question as to whether or not a lode

if discovered at the point of discovery extended into the ground in controversy and the question of the identity of the mineral bodies. The Court says to the jury:

"Perhaps there is some doubt here also whether any body of mineral or mineralized rock that may be called a lode was found in the discovery shaft, and if so found, whether the same body was exposed in the territory in dispute. Those questions are submitted to your decision on the evidence, and assuming that the plaintiffs have established their rights, as before explained to you, if you further find that the defendants' grantors discovered a lode in the "Eliza" discovery shaft and that said lode extended from thence into the ground in dispute, the defendants will prevail."

The learned judge then comes to the portion of the instructions upon which plaintiffs rely, which is as follows:

"As was before explained to you, plaintiff's right cannot be of earlier date than July 30th, 1879; and defendant, if his grantors made a valid discovery and location, dates back to 1878; long prior to the date of plaintiff's title by possession. It is true that there is some controversy upon the question whether at the time of the survey of the "Eliza" lode in July, 1878, the locators had sunk their shaft to a point where they claimed to have found the lode; but if they had not done so, they did in effect sink to the point mentioned by September

following, and if they did then find the lode they could have the advantage of it against all who had not then acquired an interest in the lode in the same manner as if they had uncovered it before making their survey and filing their certificate."

The court speaks of the time of the "survey." The particular claims under consideration were located upon the ground by survey, in 1878. The contention appears to have been as to whether or not the locators sunk their shaft as provided by section 2401 of the Revised Statutes of Colorado, which required the sinking of a shaft after the discovery of the lode. You might discover a lode under the laws of Colorado at the surface; the discovery would be good under the nations law, but under the laws of that state the location would not be perfected until after you had sunk ten feet upon this lode and the question frequently arose, and it seems to have arisen in all these Colorado cases, relied upon by plaintiffs, whether or not the shaft was sunk the requisite depth before location of the claim. The question of the discovery of mineral seems to have been merely incidental.

I would again direct the Court's attention to the distinction between a failure to perform the acts required by a state law, which are mere regulations, and a failure to perform those things required by the Act of Congress, which is the basis of title.

The next case cited and relied upon by counsel in support of the proposition that a subsequent discovery made valid a location void for want of discovery, is the case of the Golden Terra M. Co. vs. Mahler, 4th Morrison, 390, which is merely the findings of a District Judge of Dakota at trial, and not a decision of any Appellate Court.

In this case, however, the Court says: "I am of the opinion and so hold, that the spirit and intent of the Act of Congress is to require as a condition precedent to the location of a mining claim, that a discovery of a vein bearing valuable minerals shall first be made within the limits of such location independent of any other subsisting and valid location."

And this Judge in the findings (page 399, 4th Mor.), says: That even though no discovery of a vein was made in the "Ophir" claim at the time of its attempted location in June, 1876, that still if such discovery was made therein prior to any discovery of a vein within the defendant's mining claim, the Golden Terra Extension, that the Ophir claim would be good from the date of such discovery. No authority is cited by this Judge in support of this proposition. He simply says that he thinks the proposition is sound law, that the order of the acts to be performed is not essential, provided that no intervening rights of others have accrued. It does not appear from the Statement of Facts made by the Court in this case,

so far as we have been able to understand it, that there was an entire absence of mineral bearing rock at the discovery of the Ophir at the time, or prior to the location, but it was only a question of the discovery of the "vein." Without a fuller statement of the facts as to what actually did exist at the discovery point at the time of the location no intelligent application of this doctrine can be made, even admiting that it is an authority that may be followed. But the facts as stated by he Court at page 401, would indicate that the gold was found in the slate and that the slate was a country rock, and that the material on the surface at the point of discovery of the Ophir claim was really mineral bearing rock in place.

But the conclusions of the judge in this case amount to no more than the argument or brief of counsel. They would not even be authority in the Courts of Dakota, being only the findings of a Judge sitting at the trial.

The case on appeal was decided on other points. 2nd Dakota, 377.

The next case relied on by plaintiffs is that of Patchen vs. Keeley, 14th Pac., page 347, a decision by the Supreme Court of Nevada.

This was an action of trespass, *quare clausum fregit*, and the Court says:

"It is enough to say that plaintiff was not obliged as

against defendants to prove any better title than actual possession gave him. It was not necessary for him to prove the discovery of any lode within the boundaries of his claim, prior to location. In a word, in order to make a *prima facie* case 'against defendants, having shown possession, plaintiff was not obliged to prove a valid location. Defendants were not in position to assail plaintiff's title."

The whole case turned upon possession and not upon title. It was the case of a trespasser going in without title, or claim of title, and attempting to raise technical objections against the title of a man whose possession he had invaded. It can in no degree support the plaintiffs' contention.

The next and last case cited and relied upon by plaintiffs is that of McEvoy vs. Hyman, 15 Mor., 397.

This case turned upon the sufficiency of the amended location notice. The Court held that after the original certificate of the "Durant" location was amended, that certificate and the amendment were properly received in evidence as constituting a perfect certificate having effect from the date of the original. In this view of the case it is held that the "Durant" title is superior to the other, and must prevail, and the Court says the other questions in the case may be passed without discussion. The decision in no manner supports the position contended for by plaintiff in this case.

We have now reviewed all of the cases cited by plaintiffs' counsel in support of this contention and we find but two of them to be decisions of Appellate Courts, namely, Strepey vs. Stark, and Patchen vs. Keeley. Jupiter M. Co. vs. Bodie, is simply a report of instructions given to the jury by Judge Sawyer. Zollars vs. Evans, is instructions given to the jury by Judge Hallett. Golden Terra vs. Smith is the findings of Judge Moody at that trial. Patchen vs. Keeley is a decision of the Supreme Court of Nevada which in no manner supports the contention of the plaintiffs. McEvoy vs. Hyman seems to be a decision rendered by Judge Hallett, in a suit in ejectment when a jury was waived.

DID THE LOCATORS OF THE "KIRBY FRACTION" EVER MAKE A DISCOVERY?

Witness Johns, one of the locators, says: They found float. (Trans. p. 145.) That they afterwards ran a cut into the solid rock, and while he frequently speaks of making a discovery, yet when he is asked directly as to the nature of that discovery, he fails to establish one. The first testimony we have is on Trans. p. 146, where he says that in this cut which they ran about twenty feet, under cover, long after the location of the claim, they found "quartzite," "clay," and "rock,"—"mineral bearing rock, containing a trace of lead

and silver." He says at Trans. p. 147, that they had the same character of discovery on the "Edith" that they had on the "Kirby." That it was just as good on one as on the other. At Trans. p. 149 he says, they made a discovery on the "Edith;" that there was as much work done on the "Edith" as on the "Kirby." That they were actually working on the "Edith at the time they located the "Kirby."

Sullivan testifies substantially to the same facts, and that there was no discovery made on the "Kirby."

But whatever these locators may say about making a discovery, we must always bear in mind that a discovery should be as apparent to those investigating the matter at any subsequent period as it was to those who claim to have made it. It must necessarily be continuing in its nature, and if there was a discovery made there by Sullivan or Day, or any other locator, it should and would be there now. We have had pointed out to us by the testimony of Loring, Bradley, Burch, Burbidge, McDonald and Linney that which they rely upon as a discovery. They claim that it exists now. Waiving, for the purpose of this consideration, the question as to when it was made, we contend that even now they have utterly failed to show a discovery, or the existence of such a lode, or mineral bearing rock in place as would validate the "Kirby" location. It is but a fair inference from the testimony in this case, that every effort which a liberal expendi-

ture of money could make, has been made for the purpose of trimming up, marking out and making apparent a lode or several lodes or stringers in, and connected with, the tunnel. We will take them in the order in which they are claimed to exist by the witnesses McDonald, Bradley and Burch. McDonald says: Commencing at the mouth of the tunnel No. 1, is a well defined ledge about two inches thick. He speaks of it in most positive terms. Says the walls bear evidence of striation. This seems to be about fifteen feet in, under cover. Two assays taken from this place by Burbidge show: The first, ½ oz. silver, and the second, 6-10 of an ounce of silver per ton. Neither of them shows any lead. Some of the witnesses testified that a silver result can be obtained from any of the country rock in that section. We are prepared, however, to admit that if, at the discovery of a claim, mineral bearing rock in place carrying ½ oz. or 6-10 of an ounce in silver was found under such conditions that a miner might be justified in following it with the expectation of finding ore of better quantity and quality, it might constitute the basis of a location; but in this case we find that these people did not consider this crevice, or seam, or whatever it may be, a sufficient indication for them to follow upon. According to the testimony, it was first uncovered eleven years ago, and during all of the intervening time they have not attempted to follow it nor have they shown any inclination to do so, "with the expectation of finding ore." We must take this as the

judgment of the locator, or those who have succeeded him in interest; but we desire at this point to suggest to the Court that while it is true a location may be made upon such indications of "rock in place," as a miner might follow with the expectation of finding ore, nevertheless if the miner does commence development upon such indication and it is after thorough exploration demonstrated that it is not a ledge of mineral bearing rock in place then his location would be void.

The Court in the case of the Waterloo Min. Co. vs. Doe, 56 Federal, 685, gives us a clear exposition of this doctrine. In that case several tons of ore yielding $600 had been extracted from a mining claim, and it was claimed that upon this showing, the location would be good. The Court holds, after reviewing the testimony that the fact that three tons of silver bearing rock, yielding $600, had been extracted from a mining claim, does not entitle the locator of a mining claim to enter the claim for patent, where there is no vein at the point of discovery or within the limits of the claim, the location having been made merely in the hope of finding such at some future period. The Court held that neither party was entitled to enter the ground.

In the case at bar after eleven years of exploration the "Kirby" claimants have failed to find anything carrying more than a trace of either silver or lead.

It would appear from the testimony of the plaintiff's witnesses, that the further they follow what they call the ledge in this mine, the poorer the material becomes. Burbridge claims to have found one-half ounce of silver in what they call vein number one, seven-tenths of an ounce in vein number two, three-tenths of an ounce in vein number three, one-half ounce still further in, five-tenths of an ounce at the bottom of the winze in the drift, four-tenths of an ounce still further in, and three-tenths of an ounce in the face of the tunnel.

W. H. Linney, one of the plaintiff's assayers who made the test of the material taken from the various places in the work by Burch, the superintendent of the Bunker Hill & Sullivan Mining & Concentrating Company (which company, we may safely say, is the real plaintiff in this case), gets results in no instance of over four-tenths of an ounce in silver, and finds no lead in excess of three-tenths of one per cent in one assay, and in three of his assays gets no lead at all. We may safely assert that these samples were taken from the parts of the work which looked most favorable to the plaintiffs.

Can it be said that after eleven years of development work upon these cracks or crevices in the earth with no better result than shown by the plaintiffs themselves, that there has ever been a discovery in this "Kirby" claim so far as the plaintiffs are concerned—such indications as a miner might

follow and find ore? It seems to us that the further they follow these indications the less ore they find.

The assertion of conclusions by witnesses, however positive, and whatever their record may be, so far as experience is concerned, of the existence of a lode in the "Kirby" claim, must give way to actual tests made of the material which, such witnesses declare, constitutes the ledge. We might pile up witness after witness, testimony upon testimony as to the existence of mineral in the rock, but the actual test and analysis made by one competent person would destroy the effect of such testimony, however voluminous and positive it might be.

The testimony of the appellant's witnesses is fully sustained by chemical tests of the rock made by the assayers of both the plaintiffs and defendant.

Col. Lindsay, whose experience is quite as wide as that of any of the respondent's witnesses so far as mining is concerned and whose employment as superintendent by some of the largest mining and milling companies of the United States, especially qualifies him to testify as to the character of rock, says: There is no ledge disclosed or discovered in the work upon the "Kirby Fraction": that there are a lot of seams or cracks such as may be found in the formation similar to that of the "Kirby Fraction," but that they do not constitute

ledges of mineral bearing rock in place. Mr. Fassett, who went upon the ground for the purpose of taking samples of all of the material claimed to be ledge matter and who did make a very thorough examination of the mine and a careful and competent analysis of the material, testifies that in no instance did he find to exceed ½ ounce of silver, or 4-10 of one per cent lead, and in that portion of the work which is claimed to be a ledge he found nothing at all. Neither Mr. Fassett nor Col. Lindsay is in the employ of, or in any manner connected with any of the parties to this suit. All of the witnesses for the plaintiffs on this subject who examined or made tests of the ore were in the employ of, or connected with the Bunker Hill & Sullivan Mining & Concentrating Company.

It being admitted by the locators of the "Kirby Fraction" or the "Edith," whichever it may be called, that no discovery of a lode or vein was made at the time of the location, then the burden of showing that a discovery, if made at all, was made prior to the 21st day of March, 1894, that being the date of the Shoshone mining claim, rests most strongly upon the plaintiff and the lenient rule stated by the Judge. (Folio 71).

From the testimony of Josiah Hill (Trans. p. 83), who did the work in 1892, it could not possibly be found that any ledge such as the law contemplates had been discovered upon that claim. It is not claimed that any further work was done

in 1893 or 1894, these being the two years during which the performance of annual labor was exempted by the Act of Congress. It appeared that the witness Smith (Trans. p. 83) was testifying as to what he was doing in July, 1896. Edward Sullivan, one of the locators of the "Kirby Fraction," says (Trans. p. 107, folio 221) that they never made any discovery on the "Kirby," and that he did not know or talk with Smith prior to the trial. Mr. Rutter, one of the defendants, says that he did no work personally in 1892, 1893 or 1894 on these claims, but his testimony establishes no discovery up to that time, and it is apparent from all the testimony that if any such discovery as seems to have satisfied the mind of the trial Court was made, it was made after the location of the Shoshone mining claim.

We feel safe in concluding that not only was no discovery ever made upon the "Kirby Fraction" claim prior to the location thereof, but that none has ever since been made, and that any attempted location upon that claim was and is now void for want of discovery.

RECAPITULATION OF OBJECTIONS TO PLAINTIFFS' TITLE.

I.

That the ground was not vacant and subject to location

at the time of the location of the "Kirby Fraction."

II.

That no discovery of a ledge or vein of mineral bearing rock in place was made upon the "Kirby Fraction" prior to the location thereof, or prior to the location of the "Shoshone" claim.

III.

That no discovery of a lode or vein of mineral bearing rock in place has ever been made upon the "Kirby Fraction."

IV.

That the annual assessment work upon the "Kirby Fraction" claim for 1895 and 1896, was not performed by the plaintiffs or any person under whom they claim, and that the affidavits sworn to by Bradley, one of the plaintiffs, that such work was done by the Bunker Hill & Sullivan Mining & Concentrating Company, and that said company was the owner of the "Kirby Fraction" claim is an admission by the plaintiffs that the plaintiffs are not the real owners of the "Kirby Fraction" claim or the persons interested in this action.

And we contend that each and every one of these objections against the plaintiffs' right of recovery is good and should be sustained by the Court.

ERRORS AT TRIAL.

The 4th, 5th, 6th and 7th assignment of error are based upon the refusal to admit in evidence the four instruments in writing signed, sworn to and recorded by one of the plaintiffs in this action. (Trans. p. 50-54). Those proofs were offered for several purposes. First, when taken in connection with the examination of the plaintiffs, for the purpose of showing that the plaintiffs were not the real parties in interest, and not entitled to maintain this action.

The Revised Statutes of Idaho, Section 4090, provide: "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided by this code."

It is not claimed that the plaintiffs sue for any other person, or that they are within any of the exceptions named in the statute.

A party not having title cannot maintain an action in the United States Courts to quiet title or remove a cloud, and the proofs offered showed that one of the plaintiffs had declared in effect, under oath, and has made it a matter of record, that the Bunker Hill and Sullivan Mining and Concentrating Company was the owner of the "Kirby Fraction" claim and had performed the annual labor on it for the years 1895 and 1896, which covers the time since before the application for patent. These proofs taken in connection with

the offer of the defendant to prove by the plaintiffs when on the witness stand that they had no real interest, were sufficient to establish the fact that the plaintiffs were not entitled to a patent for the "Kirby Fraction" mining claim. When both Bradley and Rutter were on the witness stand, we sought to prove by them that they were not the owners of any interest in the "Kirby Fraction" claim, and the Court denied us the right. (Trans. p. 81-92-93-95-96). The 8th and 9th assignments of error are based on this ruling of the Court.

The tenth assignment of error is directed to the refusal of the Court to permit the defendant to show by examination of the plaintiff Bradley that all the assessment work which had been done on the "Kirby Fraction" claim and to which any proofs offered by plaintiffs referred, had been done by and paid for by the Bunker Hill and Sullivan Mining and Concentrating Company as the owners of the claim and that he had filed sworn statements to that effect. All of this class of testimony was excluded by the Court. If the assessment work on the claim was done by a stranger to the title under a claim of adverse title these plaintiffs could claim nothing by virtue of it.

Turner v. Sawyer, 150 U. S., 578.

The twenty-fifth assignment of error is directed to the failure of the Court to make separate and distinct findings of

fact and conclusions of law and applies to each assignment of error after the seventeenth.

National Masonic Acc. Ass'n v. Sparks, 83 Fed. Rep., 225.

We have this conclusion from the foregoing. If the Bunker Hill Company is the owner of the "Kirby Fraction" claim then these plaintiffs cannot recover in this action; if said Company is not the owner of the property then its performance of annual labor cannot avail the plaintiffs. The allegations of the complaint that plaintiffs performed the requisite annual labor on the claim are denied, and in view of the fact that we offered to prove that the only labor that had been performed on the claim had been done by a stranger, and adverse claimant, and were prevented from so doing under the objection of plaintiffs and the ruling of the Court, there has been no sufficient proof of the performance of the annual labor, and the plaintiffs failed to prove a material issue necessary to entitle them to recover.

APPELLANT'S TITLE.

We next come to the inquiry as to the sufficiency of the appellant's title to the "Shoshone" mining claim.

This location is based upon the discovery of a lode made more than one thousand feet below the surface of the ground by means of an entry through the tunnels of a neighboring

claim, which had penetrated into that portion of the ledge upon which the discovery was made. (The surface outcrop or apex of this ledge is not within the claims of either the plaintiffs or defendant, but is within the "Last Chance" and "Emma" claims, and probably crosses the "Stemwinder" into the "Bunker Hill"). It is stipulated in the record (Trans. p. 136-139) that the apex of the ledge upon which the "Shoshone" discovery was made is within the "Last Chance" claim. It is admitted that the ledge passes lengthwise through the Tyler on the north, and through the "Stemwinder" and "Bunker Hill" on the south.

The first, and perhaps the most important question so far as the title to the "Shoshone" claim is concerned, is whether or not a mining claim can be located upon the surface of the ground, or at all, based upon a discovery made on a ledge deep in the ground, where the apex and the outcrop of the ledge is shown to belong to another mining claim, having no extra lateral rights.

The "Last Chance" mining claim lies practically east and west. The dip of the ledge having its apex within that claim is to the southwest. The United States Supreme Court in the case of the Last Chance Mining Co. v. the Tyler, 157 U. S., p. 683, has held that the "Last Chance" claim owns that portion of the ledge lying between the planes drawn on its side lines, which are held to be, at law, the end lines of the

claim. This would seem to cut off the right of the Last Chance to this ledge at its south side line. At the point where the ledge passes through said side line, it is from one thousand to twelve hundred feet below the surface of the earth. It is manifestly impossible to make any surface location upon that vein without discovering the ledge, by some method, at this depth. How then shall this discovery be made? No location of that ledge can be made without a discovery. Would a discovery made at the bottom of a shaft sunk from the surface down to the point where this ledge would be intersected have any more validity than a location based upon a discovery made by entering through a neighboring claim, as was done in this case? Will it be contended that the law has made no provisions by which a ledge so situated can be located at all? It was contended at the trial and upon the argument, that this location was invalid because other people owned the apex of it, and because the locator did not have any apex, but in fact the parties who own the apex of this ledge have no right to follow it to the point where the discovery of the "Shoshone" was made. The "Last Chance" cannot follow it beyond its south side line. If the "Emma" can be given extra lateral rights to the extent of the vein passing through that claim, disregarding the fact that the lines intersecting the ledge are not parallel, then it would be within the rights of the "Emma" upon the dip, were it not for the fact that the projection of the "Emma"

north line does not include the discovery point on the "Shoshone" claim.

It will be seen by projecting the north side line of the "Emma" and the south side line of the "Last Chance," that the discovery of the "Shoshone" is located upon an angle of ground lying between these lines so projected. This was the deliberate purpose of the locator, and the exact location was determined with great accuracy. Some maps used upon the trial that were not made with exactness, might not show the fact as it exists, but an accurate survey and platting of the lines of these claims will show that the discovery of the "Shoshone" claim is not within the projected lines of either the "Last Chance" or the "Emma." It was not within the lines of the "Kirby" as it was staked upon the ground and officially surveyed by Mr. Loring. The west line of this Loring survey of the "Kirby" was also determined with great precision, prior to the location of the "Shoshone," and the point in the vein selected as the discovery point of the "Shoshone" was not within the lines or the projected lines of any existing mining claim.

Under the order of survey issued by the Surveyor General of Idaho, upon the "Kirby" location, in 1889, F. C. Loring, to whom the order was then directed, in his official capacity in adjusting the lines of the "Kirby" claim, under the power and authority given him to make the official survey, adopted

the easterly end line of the location as the official end line and drew in the westerly end line to conform to it, thus drawing the southwest corner post in to a point as shown upon the small plat in evidence, and inserted herein marked "Map B, Exhibit 2," Trans. p. 75. Mr. Loring testified that he planted these official posts at the point thus indicated, and it is clearly in evidence that they remain there so far as we know until this day. Mr. Loring also admits that he gave Mr. Miller, another Deputy U. S. Mineral Surveyor, the notes and memorandum of this survey showing the drawing in of the southwest corner, and Mr. Miller, acting upon such information in locating the "Shoshone" claim, established the point of location of that claim to the westward of the westerly end line of the "Kirby Fraction" location thus established by Loring.

Counsel has sought to avoid this line on the ground that the owners of the claim did not authorize it or recognize it.

The 13th assignment of error is directed at the decision of the Court on this question and as to the real boundaries of the "Kirby Fraction" claim. Edward Sullivan, one of the locators of the "Kirby Fraction" claim, and at the time an owner, testified that: "We had an official survey made of the 'Kirby.' I was the owner of it at that time." (Transcript page 107). To the question: "Did you instruct Mr. Loring to draw in the corner of the 'Kirby' claim?" witness answered, "I think I authorized Mr. Spaulding to have Mr. Loring draw in the corner."

Mr. Loring testified on this question: (Trans. p. 74, Folio 156). "Mr. Sullivan was present with me on the 22nd of July when I was surveying. No one directed me how to make that survey. I used my own judgment entirely. Mr. Spaulding was not present when I made the actual survey. It was not made by his direction." In answer to a question by the Court, witness Loring said: "Mr. Spaulding employed me, he was the only man I ever knew in the transaction. The work of drawing in the line of the claim was entirely my own without any one's advice." On cross-examination witness said: "I had to make those end lines parallel. I retained the eastern end line. I paralleled the western end line with it. That was done under the direction of the Surveyor General." (Trans. page 75).

W. L. Spaulding testified on this subject:

"I know the 'Kirby' ground. I was once in possession of the ground by virtue of a bond. I employed Mr. Loring to make an official survey as requested by the owners, Mr. Rutter and Mr. Sullivan—the same Mr. Sullivan that was just on the witness stand. I had the survey made. I was directed by the owners of the claim.

"It was understood that I should go ahead and make the survey for patent; the authority was understood; it was one of the conditions of the bond. * * * Mr. Loring made that survey under my instructions."

Being shown the plat marked defendant's exhibit Q witness states that Mr. Loring gave him that plat as the result of his survey. (Trans. page 109).

"I was in possession of the property from March, 1889, to July, 1892. It was during that time that I had the survey made. Mr. Loring and myself had the order for survey fixed up. I don't know whether Mr. Rutter had anything to do with it or not."

On cross-examination witness testified: "I was in possession of that ground from March, 1889, to July, 1892. I was working on the ground. I quit in July, 1892. The survey was made in 1889. I was there when the survey was made, but not with Mr. Loring. We consulted about making it. The matter of the lines was left to Mr. Loring. We talked about drawing in the lines, and the best way to parallel the lines, Mr. Loring and I. After he had completed the work he gave me the plat of it." (Trans. page 109).

Notwithstanding the undisputed testimony of one of the locators, Mr. Sullivan, the Deputy Mineral Surveyor Loring, and W. L. Spaulding, who had the property under bond for three years, and as he says, with the understanding that he was to have it surveyed officially, the Court has found, in effect, that the drawing in of the west end line of the "Kirby" claim was without authority of the owners. The Court holds that it is immaterial as to whether or not the line had been

drawn in, yet we insist that it is material and that the record shows that the line was actually drawn in leaving the ground upon which the location notice of the "Shoshone" was posted outside the "Kirby Fraction" claim.

The appellant sought to show that the point of location and the point of posting the notice on the "Shoshone" claim was upon vacant ground and not within the lines of any other mining claim. It established this fact by showing the real lines of the "Kirby Fraction" claim as they had been drawn in six or seven years prior to the location of the "Shoshone" claim. The facts of this case show that after the "Shoshone" had applied for a patent, the "Kirby" claimants abandoned the lines as they had been officially surveyed and either adopted some old lines or extended their new lines so as to include the discovery point on the "Shoshone" claim for the purpose of embarrassing it and attempting to defeat its location by showing that its point of location and the posting of the notice was within the boundaries of an existing mining claim.

The grounds upon which the Court held it to be immaterial as to whether or not the point of posting of the notice of discovery of the "Shoshone" claim was within the "Kirby Fraction" lines seemed to be based upon the wrong assumption that the "Shoshone" is claiming something by virtue of the tunnel site law. It makes no such claim, nor has it ever at any time claimed anything under the provisions of that

law. Its claim is based upon the plain, simple, fact, that it discovered a ledge of mineral bearing rock in place belonging to no one, which was upon the public domain of the United States at a point not within the boundaries of any other mining claim; that upon making such discovery it posted a notice of location upon the surface at a point over the point of discovery within the boundaries of the surface claim located and based upon such discovery, and that by virtue of such location it was entitled to hold and patent the "Shoshone" claim under exactly the same conditions and the same rights as though discovery had been made upon the surface.

At the argument below some claim was made upon behalf of the "Stemwinder" mining claim to the ledge in question, and it was contended that these ore bodies upon which the "Shoshone" claim was located belonged to the "Stemwinder" ledge upon its dip. We will only say at this point that the "Stemwinder" mining claim has no extra lateral rights under any construction of the law. And neither the question, nor evidence upon which such question might be determined, is before the Court.

The Courts have not been called upon to determine specifically the question herein presented, as to the validity of the location of the "Shoshone" claim as based upon the discovery made upon a vein after it had left the side line of the "Last Chance." The nearest that the Court has come to a consid-

eration of the question was in the case of Van Zandt v. The Argentine Min. Co., 2nd McCrary, page 159, 8th Federal, page 725, 4th Mor. 441, which was affirmed by the United States Supreme Court in the 122 U. S., page 478. In this case the Court below held that ordinarily, the owner of a mining claim in which is found the top or apex of the ledge, can follow the vein within or without his side lines on its dip to any depth, yet if the same vein should have been previously discovered and located on the dip, such discovery will prevail against a junior discovery though located on the apex of the vein.

But we are met with the objection at the argument that it must be a prior location upon the dip, and that if the apex has once been located, no location can thereafter be made upon the dip.

But we are unable to see why any distinction should be made in the application of this principle. To illustrate, suppose two locations are made upon a vein adjoining each other but with diverging lines. They cover the apex, but because of the divergence of the lines a wedge shaped portion of the ledge would lie between them. What is to become of this section of the vein lying between these two claims on its dip in the earth, in the angle made by their divergence? Or suppose a single claim located in such shape that it had no extra lateral rights, had the apex of a vein which dipped out of its

lines at a great depth below the surface. The apex has already been located, but has been so located as to give no rights to follow and include this particular section of the vein on the dip. Will it be maintained that because some one had located the apex in such manner as to give him no right to include such portion of the vein, in depth, that it must be forever lost, and that no one could obtain title to it? Would it not be competent for a prospector to sink down from the surface and make a discovery of the vein at the point where the rights of neighboring claimants cease, and hold it from that point; and would it not be as competent for him, if he could gain access to it by means of a tunnel or underground working to make a discovery on the ledge and then come upon the surface and make his location? If such a location can be made, then we contend that the "Shoshone" comes entirely within the principle upon which it would rest.

It appears from the undisputed testimony, that in March, 1894, W. C. Miller, the locator of the "Shoshone" claim, entered through what is known as the "Sweeny" tunnel in the "Last Chance" claim and passed on beyond the "Last Chance" lines, to the point selected as the discovery point of the "Shoshone" claim, and there in a large ledge of galena ore, the existence and character of which are not disputed, he selected his discovery point. That he thereupon by accurate surveys and measurements, went upon the surface of the ground and posted a notice of location at a point directly over

the point selected as the discovery point. That he then proceeded to mark out the boundaries of the "Shoshone" claim, in the manner provided by law and recorded it in the proper office. That he afterwards conveyed the "Shoshone" claim to the defendant in this action, and that it has since that time expended a large amount of money in the further development of said vein and has applied for a patent for the surface ground originally located by Miller.

At the trial and on the argument of the case counsel for plaintiffs admitted that there was no connection or identity between the ledge upon which the "Shoshone" and "Ibex" claims were located and that which they pretend to have discovered in the "Kirby Fraction" location. It was contended at the trial that the vein which they claim to have discovered in the "Kirby Fraction" had an entirely different course, direction and character, from that upon which defendant's discoveries were made.

It is not contended that the apex or any part of the apex of the ledge, upon which the discovery of the "Shoshone" claim was based, lies within the plaintiff's claim. The respondents, therefore, can claim no right to the ledge located by the appellant by reason of the provisions of the law which give to the locator all other ledges than that located, the apeces of which lie within said location. We are thus brought back to the inquiry, if the appellant cannot hold, and does

not own, the ledge located in the "Shoshone," who does own it?

Because of the errors herein discussed, we submit that the judgment in the first of the consolidated cases was erroneous and should be reversed, and that the Circuit Court should be further instructed to dismiss the action for want of jurisdiction.

Respectfully submitted,

W. B. HEYBURN,

LYTTLETON PRICE,

Counsel for Appellant.

SHOSHONE MINING CO.,

Appellant.

v.

ROYAL J. RUTTER and F. W. BRADLEY,

Appellees.

STATEMENT OF THE CASE.

This case is consolidated, for the purpose of appeal, with the case just submitted. It was commenced in the State Court of Idaho, and was removed to the United States Circuit Court for the Northern District of Idaho, because it was claimed that a federal question was involved. The parties are all citizens of Idaho.

In disposing of this case the trial Court merely says (Trans. 196): "The facts and the law applicable to this case being so similar to those in the case of Royal J. Rutter et al. v. The Shoshone Mining Company, just decided, it is deemed unnecessary to review either here, but making the decision in that case the basis for the action in this, judgment herein is rendered in favor of the defendants.

"BEATTY, Judge."

No other findings of fact or conclusions of law were made by the Court, and upon this a decree was rendered against the appellant and a perpetual injunction granted.

The same assignments of error relied upon in the former case, herein considered, are adopted for and applied to this part of the consolidated appeal, under the stipulation and order consolidating the two cases on appeal.

ARGUMENT.

Had the case remained in the State Court, under the rule of action established by the Supreme Court of Idaho, in the case of Burke v. McDonald, 13 Pac., 351, the parties would have been entitled to a jury trial. By removing this case to the United States Court, they were deprived of that right under the ruling of that Court that the proceeding was in equity.

If the civil action brought in the State Courts is essentially, as hitherto understood, a suit at common law, the common law form, and not an equitable one, must be pursued if the case is removed into a Federal Court.

Thompson v. Railroad Companies, 6 Wallace, 134.

Identically the same ground being involved in this controversy between the "Kirby Fraction" and the "Shoshone" claims, the action was not maintainable at all, in view of the

fact that another action was pending in the same Court to determine that question; but, under the peculiar, and we think irregular, practice of the Land Office, the application for patent for the "Kirby Fraction" claim having been allowed, appellant was compelled to institute suit in order to prevent the entry of the land upon that application, as hereinbefore more fully considered.

As to that portion of the "Kirby Fraction" claim adversed on behalf of the "Ibex," if the "Kirby Fraction" location is defeated in the first action as to the ground in controversy with the "Shoshone," it could not recover as against the "Ibex."

Gwillim v. Donnellan, 115 U. S., 45.

In this case the Shoshone Mining Co. is plaintiff in an action brought in support of an adverse claim, filed in the United States Land Office against the application for patent for the "Kirby Fraction" claim.

So far as the ground in conflict between the "Kirby Fraction" and "Shoshone" claims is concerned, all of the questions involved therein have already been presented; but I especially desire to call the Court's attention to the fact that the United States Land Office had no authority to permit an application for patent to be made by the "Kirby Fraction" for a portion of ground already applied for, and in litigation

before the Court. The law does not permit two suits to be brought and maintained at the same time in the same Court for the determination of the same question. The plaintiff in this second action was compelled, in order to avoid a default for want of an adverse, to proceed as though it had made no application for this ground and to bring its action in support of the adverse claim which it had been wrongfully compelled to file.

The facts and circumstances as to the location of the "Ibex" claim are substantially the same as those pertaining to the location of the "Shoshone." The only additional question which we are called upon to consider in this action is as to whether or not the right of the "Stemwinder" mining claim can in any way affect the validity of these discoveries.

It is shown by the plat herein that the ledge upon which the discovery of the "Shoshone" and "Ibex" claims was made, having its apex in the "Last Chance" claim, extends through the "Stemwinder," and it is contended that the "Stemwinder" would have the right to follow the ledge on its dip down to and including said discoveries. We reply to this that the "Stemwinder" mining claim, under no rule of law, can follow the ledge beyond the side lines, even admitting that it extended on its dip to the discoveries of the Shoshone Mining Company.

It is first necessary to have an accurate understanding as to the present shape of the "Stemwinder" mining claim. It is no longer a four-sided figure, as would appear from the plat. We offered in evidence at the trial the judgment of the District Court of the First Judicial District of Idaho, in and for Shoshone County, in the case of the Stemwinder Mining Company v. The Emma and Last Chance Consolidated Mining Company, brought in support of an adverse claim filed on behalf of the "Stemwinder" against the application of the "Emma" for a patent. By this judgment all of the land in conflict between the "Emma" and "Stemwinder," as shown by the plat, was awarded to the "Emma" and was adjudged never to have been a part of the "Stemwinder" mining claim. Again we offered in evidence a certified plat showing that the northwesterly point of the "Stemwinder," shown to overlap the "Last Chance," was patented to the "Last Chance," thus leaving the "Stemwinder" mining claim a six-sided figure. Now it is contended that the "Stemwinder" may follow the ledge on its dip to the westward, and counsel contended in argument that it might follow on the plane of its original end lines, and seemed to disregard the judgment that had been rendered as between the "Emma" and "Stemwinder;" but we must bear in mind that this judgment was affirmed by the Supreme Court of Idaho (2 Idaho, 421; 21 Pac., 1040), and affirmed by the Supreme Court of the United States, 149 U. S., 787,

and is conclusive as to the question of the lines of the "Stemwinder."

The question then arises, upon the plane of what lines could the "Stemwinder" follow the ledge, if it was so located that it might go beyond its side lines; would it be between its southerly end line and the southerly side line of the "Emma" projected, or would it be between its southerly end line and the southerly side lines of the "Last Chance?" These two propositions present different planes, and no parallel lines, intersecting the ledge.

But another serious objection to the granting of extra lateral rights to the "Stemwinder" interposes itself, and is based upon the rule established by the Trial Court and affirmed by the Circuit Court of Appeals, in the case of the Tyler Mining Co. v. Sweeny, which is, that in determining the direction in which the ledge may be followed on its dip, it is necessary to determine whether or not it is being followed more on its dip than on its strike. The course of the end line of the "Stemwinder" claim which intersects the ledge, is north 71 degrees and 50 minutes west. The course of the ledge, as shown upon the plat and as has been determined in all controversies where this question has arisen affecting this particular part of the ledge, is between north 45 degrees west and north 48 degrees west. Thus we see that the difference between the course of the ledge and the "Stemwinder" line, is

from 23 to 25 degrees, and is upward of 20 degrees more along than across the ledge. In fact, the right of the "Stem-winder" to follow on a plane drawn on its end line as claimed, would be practically to allow it to follow lengthwise along the ledge.

A diagram, Exhibit I herein, shows the surface lines and the course of the ledge through the several claims. The ledge line most favorable to the appellees, shown on this map or contended for, would be more across than along the "Stem-winder" claim, and would defeat any claim of that location to follow the ledge beyond its exterior lines under the rule established. It is only upon the dip of the ledge that the owner of the apex may follow down. The statute itself, in express terms, says (Revised Statutes of the United States, Sec. 2322), that the locator of a mining claim shall have the exclusive right of possession and enjoyment of "all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface-lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end-lines of their locations, so continued in their

own direction that such planes will intersect such exterior parts of such veins or ledges."

It is evident from the language of the statute, and from the language of this Court in the case of Iron Silver Mining Co. vs. Elgin, 118 U. S., 196, that it is the true dip of the ledge upon which the owner of a mining claim, having the apex, may follow down and that it is to be followed down and not along the surface. If the Stemwinder claim could follow along on this ledge near the surface, as it apparently would under the claim of the appellees, who would own that portion of the ledge lying southward of its south end-line?

The Trial Court, in disposing of this question, says (Trans. 32): "But it is also argued here that when those "planes are more along the course of than across the ledge, "that the ledge cannot be followed beyond the boundaries of "the claim. It is true, as suggested by counsel, that this Court "once instructed a jury (but with much doubt) that a ledge "could not be followed more on its course than on its dip, "and it does seem absurd, when the law says ledges may be "followed on their 'depths,' for the courts instead to say they "may be followed along their 'course.' But the Court of Ap- "peals did not by word affirm this instruction of this Court, "nor has that rule been supported by any court save a *nisi* "*prius* court in Utah Territory. It would seem that the only "logical conclusion of the holdings of the Courts that ledges

"must be followed between the planes of the lines they cross "is that they may be followed indefinitely between those planes "prolonged, for to say that when such following would be more "along the course than on the dip you must stop at the side "boundary line of the claim, is making a new law which Con- "gress never authorized. If there is any one right specially "granted by Congress it is to follow the ledge indefinitely on "its depths, which the miner has always claimed and done, "only he followed it on its dip, which, to some extent, the "Courts have unfortunately felt constrained, under their views "of the law, to modify."

The Trial Court was mistaken in asserting that the Circuit Court of Appeals did not affirm the instruction referred to.

The instruction referred to was given at both trials, and in considering it on the second appeal the Circuit Court of Appeals says:

"The question of the priority of the locations is not in- "volved in this case unless there was a controversy upon the "facts as to whether the lode in question, in its true course "lengthwise, passed through the ground of the Last Chance "claim at nearly right angles. This Court, in its former opin- "ion, in answering the contention of counsel on this point, ex- "pressed its views of the law in relation to the rights of the

"respective parties upon the theory that the lode in question, "in its true course lengthwise, crossed the side line of the Tyler "claim, and passed through the Last Chance claim at nearly "right angles. It is now claimed by the Tyler that the lode, "in its course lengthwise, does not cross the side lines of the "Last Chance at nearly right angles, as the dotted line of the "foot wall of the lode on the diagram might seem to indicate; "that the line, as thus drawn, followed the undulations of the "ground on the surface, but that the underground develop- "ments clearly show that the location of the Last Chance claim "was more along than across the lode. The testimony upon "this point is not contained in the record, and that question is "not properly before us for review; but there is a map, which "was made an exhibit in the case, which, upon this hearing, "is filed in this Court, on which are represented lines purport- "ing to be a true representation of the testimony of the vari- "ous witnesses as to the true course lengthwise of the lode "through the Tyler and Last Chance claims. From these lines "it appears that the location of the Last Chance was more "along than across the lode. If this correctly represents the "testimony that was given upon the trial, it was unnecessary "for the Court to instruct the jury as to the rights of the Last "Chance upon the theory that the lode, in its true course "lengthwise, crossed the side lines of the Last Chance at "nearly right angles. If the true course of the lode length-

"wise is more along than across the locations, then the mining "law, to which we will hereafter have occasion to refer, de- "termines the rights of the respective parties, independent of "the date of their locations. The right of each party to follow "the lode on its strike or true course lengthwise is terminated "at the point where the lode crosses the side line of the Tyler "and Last Chance locations; but each company would have "the right to follow the lode, the top or apex of which is with- "in its surface lines, on its dip, not upon its strike, upon a ver- "tical plane drawn downward parallel to the end line, at the "point where the strike of the lode ended; that is, at the point "where the lode, in its lengthwise course, intersects the side "lines of the claims. The Tyler would be entitled to all that "portion of the lode that lies westerly of such vertical line "drawn downward, and the Last Chance would be entitled to "all that portion of the lode easterly of said line. But the "Court gave instructions to the jury to the effect that if they "found from the evidence before them that the lode in its "course lengthwise crossed the side lines of the Last Chance "location at nearly right angles, and if they should also find, "from other evidence, that 'the Last Chance claim was the " 'older, your verdict should be for the Last Chance com- " 'pany; and, in this connection, I state to you that if you find " 'that the Tyler was the older location, and find that it was " following the ledge, as I have before explained to you, upon

" 'its dip, and not upon its course, then you should find for " 'the Tyler.' Under this instruction, we are, perhaps, bound "to assume that there was some evidence submitted to the "jury which tended to show a state of facts that might have "made it obligatory upon the jury to determine the question "as to the priority of the locations in order to arrive at a "proper verdict."

Last Chance Min. Co. v. Tyler Min. Co., 61 Fed Rep., 563.

The instruction in the "Last Chance" case was against us, and beyond a question was responsible for the adverse verdict in that case. That judgment was affirmed by the Appellate Court, and the question under discussion was fully considered, and, if we understand it correctly, the decision upon it was approved.

The rights of the "Stemwinder" mining claim are not being adjudicated in this action, but it was sought to interject the claims made on behalf of it, only for the purpose of confusing, and casting a doubt upon, the validity of the locations of the Shoshone Mining Company. The Court says (Trans. folio 69): "While I am inclined to think that the Stemwinder "and the other claims named have such extra-lateral rights as "will include this vein under the Shoshone, I do not think that "question can be determined in this case without further testi-"mony, but it may be said that if there is any portion of the

"ledge within the Shoshone, which is not covered by their "extra-lateral rights, it will belong to the Shoshone, if this "latter claim is not void as against the Kirby." We contend, however, that admitting, for the sake of argument, that the rights of the "Stemwinder" claim might be taken into consideration, nevertheless that claim has no extra-lateral rights, and could, under no circumstances, follow the ledge on its dip into the ground claimed as the "Shoshone" mining claim.

But no sufficient evidence was introduced upon which an adjudication of the rights of the "Stemwinder" claim could be had, and the Court so holds in determining this question. (Trans. pp. 47-59.)

This case must, then, turn largely upon the question involved in the first of the consolidated cases, but the Court made no separate findings of fact as to this case. Aside from those questions which are peculiarly applicable to it, we must depend upon the assignments and facts applicable to the first case, and draw our conclusions therefrom.

Because of the errors relied on we contend that the judgment in this case should be reversed with appropriate instructions to the Court below with reference to the questions of jurisdiction and of the errors relied upon.

Respectfully submitted,

W. B. HEYBURN,

LYTTLETON PRICE,

Counsel for Appellant.

MAR 30 1900

In the

Supreme Court of the United States

OCTOBER TERM, 1899.

Filed March 30, 1900.

THE SHOSHONE MINING COMPANY,
Appellant,
vs.
ROYAL J. RUTHER and F. W. BRADLEY,
Appellees.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

SUPPLEMENTAL BRIEF OF APPELLANT.

W. R. HEYBURN,
LYTTLETON PRICE,
Counsel for Appellant.

17,294.

Supreme Court OF THE United States

OCTOBER TERM, 1899.

No. 208.

THE SHOSHONE MINING COMPANY,
Appellant,

vs.

ROYAL J. RUTTER AND F. W. BRADLEY,
Appellees.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

SUPPLEMENTAL
BRIEF OF APPELLANT.

Since filing appellant's brief in this cause, this Court in the case of William H. Blackburn, plaintiff in error, vs. The Portland Gold Mining Company and W. S. Stratton, No. 54, October term, 1899, did on January 8, 1900, render a decision covering the jurisdictional question involved in the case at bar; which we think disposes of the case on the third specification of error, page 15 of the appellant's brief,

which reads: "Because that it does not appear that the action is one arising under the constitution or laws of the United States or any treaty made under its authority." This is the first question discussed at page 35 of appellant's brief, and inasmuch as the contention in appellant's brief on this point is fully sustained by the recent decision of this Court above cited, we beg leave to submit this supplemental brief in order to direct the Court's attention to that decision.

It would seem apparent that the case must be dismissed for want of original jurisdiction in the United States Circuit Court, in which the suit was originally brought.

Respectfully submitted.

LYTTLETON PRICE,

W. B. HEYBURN,

Counsel for Appellant.

No. 208
Court of Limitations
Filed Sept. 5, 1900

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1900.

No. 208.

THE SHOSHONE MINING COMPANY,
Appellant,

vs.

ROYAL J. RUTTER and F. W. BRADLEY,
Appellees.

APPEAL FROM UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF APPELLEES.

CURTIS H. LINDLEY,
Solicitor and Counsel for Appellees.

17,294.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 208.

THE SHOSHONE MINING COMPANY,
Appellant,

vs.

ROYAL J. RUTTER AND F. W. BRADLEY,
Appellees.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF OF APPELLEES.

STATEMENT OF THE CASE.

For the purposes of this appeal two cases are consolidated by stipulation of counsel, as they practically involve the same subject-matter.

In the first case, numbered 81 in the trial court, Rutter and Bradley, appellees here, were plaintiffs, and the Shoshone Mining Company, appellant, was defendant. It arose under the following circumstances:—

The Shoshone Mining Company filed an application in the local land office at Cœur d'Alene City, Idaho, for a patent to the Shoshone Mining claim under the provisions of sections 2325 and 2326 of the Revised Statutes of the United States, and the Act of March 3, 1881, supplementary thereto. There was a surface conflict between this claim as surveyed and applied for and the Kirby Fraction claim (sometimes called the Kirby) owned by Rutter and Bradley. During the period of publication of notice of the patent application, Rutter and Bradley filed their adverse claim in the land office, and in due time commenced this action in support thereof. The Shoshone Mining Company is a corporation organized under the laws of the State of Idaho, and Rutter and Bradley were domiciled in that State. In other words all the parties to the controversy originating in the land office were citizens of the same State.

The action was instituted by the adverse claimants upon the equity side of the United States Circuit Court, Ninth Circuit, District of Idaho, upon the assumption that it was one arising under the laws of the United States, and was essentially equitable in its nature. The case was tried upon this theory. A decree was awarded in favor of Rutter and Bradley, which decree was affirmed by the Circuit Court of Appeals, from whose judgment of affirmance this appeal is prosecuted.

The second case, numbered 102 in the trial court, arose as follows:—

During the pendency of the first action, Rutter and Bradley filed application for patent for the Kirby Fraction claim. The Shoshone Mining Company filed an adverse claim in the land office, asserting ownership of the "Ibex" claim which it was alleged conflicted with the Kirby. In due time the Shoshone Mining Company commenced an action in the State court against Rutter and Bradley, patent applicants, to determine the adverse claim so asserted. Rutter and Bradley caused the action to be removed to the United States Circuit Court,

Ninth Circuit, District of Idaho, wherein the first action was pending. No motion to remand the cause to the State court whence it came, was made. After trial upon the merits a decree was rendered in favor of Rutter and Bradley, which decree was affirmed by the Circuit Court of Appeals, from whose judgment of affirmance this appeal is prosecuted.

While it may be generally stated that the two cases involve similar questions, there are some legal problems suggested in one which do not arise in the other. It is expedient, therefore, to discuss them separately. Following the order in which counsel for appellant presents them to the Court, we will first consider case No. 81, the suit originally brought by Rutter and Bradley on the equity side of the United States Circuit Court in support of their opposition to the application of the Shoshone Mining Company for patent to the Shoshone Mining claim.

ERRORS ASSIGNED.

On the appeal from the decree of the trial Court to the Circuit Court of Appeals, twenty-five errors were assigned (Trans., pp. 50–60), many of them directed to the *opinion* of the trial Court. On this appeal from the decree of the Circuit Court of Appeals, the assignment of errors contains only nine specifications (Trans., pp. 259–263), some of which are likewise addressed to the opinion of the trial Court. As we shall hereafter have occasion to note, errors assigned upon the opinion of the Court are irrelevant and immaterial. As we understand the practice, we are not called upon to consider any errors except those properly assigned with respect to the action of the Circuit Court of Appeals from which *this* appeal is prosecuted, unless manifest prejudicial errors unassigned appear on the face of the record.

In their opening brief counsel for appellant restate, refer to and discuss all the errors assigned on their appeal to the Circuit Court of Appeals, thus inviting a discussion of many matters which, according to our understanding, are not proper subjects for present consideration. While objecting to the

legal value of such assignments, we may feel called upon to express our views thereon—because of the invitation—not by reason of the necessity therefor.

We shall endeavor to follow counsel's presentation of the case, and submit our views upon the problems stated in the order in which they are discussed in their opening brief.

As we read the record and counsel's argument, our consideration is invited to the following questions:—

I. **Federal Jurisdiction.**—Is the Circuit Court of the United States a Court of "competent jurisdiction" within the meaning of Section 2326 of the Revised Statutes of the United States and the Act of March 3, 1881, supplementary thereto, where all the parties to the controversy, *i. e.*, the patent applicant and the adverse claimants are citizens of the same State?

Does the action contemplated and required by that section arise under the laws of the United States?

II. **Equity Jurisdiction.**—Is such an action when prosecuted in the Federal Courts an action at law or in equity?

III. **Validity of the Kirby Location.**

a. Was the ground covered by it subject to location?

b. Was there a sufficient discovery?

c. If we assume that a discovery was not made until after the other acts of location were performed, but was made long prior to the inception of any subsequent location, would such discovery be valid as against the subsequent locator?

IV. **The Right of Rutter and Bradley to Maintain the Action.**

a. Were they the real parties in interest?

b. Was the evidence by which appellant sought to show that they were not, admissible?

V. **Perpetuation of the Estate in the Kirby by the Performance of Annual Labor.**

VI. **Appellant's Title to the Shoshone Mining Claim.**

a. May a valid mining location be predicated upon the discovery of a vein on its dip, the apex of which has already been appropriated by a prior locator?

b. Was such asserted discovery within the limits of a prior subsisting location?

Certain other collateral matters of minor importance are referred to in the brief of appellant, but the above is, in our judgment, a comprehensive summary of the questions presented by appellant for the consideration of this Court.

I.

FEDERAL JURISDICTION.

Is the Circuit Court of the United States a "Court of competent jurisdiction" within the meaning of Section 2326 of the Revised Statutes and the Act of March 3, 1881, supplementary thereto, where all the parties to the controversy, i. e. the patent applicant and the adverse claimants, are citizens of the same State?

Does the action contemplated and required by that Section and Statute arise under the laws of the United States?

These questions are so thoroughly analyzed and discussed in the opinions of both trial and appellate courts that we cannot hope to add much that will aid this Court in reaching its conclusions. Some suggestions occur to us, however, which in our judgment are worthy of consideration, or at least are of value sufficient to justify a full statement of our position upon this, probably the most important, branch of the case.

So much of the Statute law of the United States as is here involved may be quoted for purposes of convenience.

The original jurisdiction of the Circuit Court is thus defined:

"The Circuit Courts of the United States shall have original "cognizance, concurrent with the courts of the several States, "of all suits of a civil nature at common law or in equity "where the matter in dispute exceeds, exclusive of interest "and costs, the sum or value of two thousand dollars, and "arising under the constitution and laws of the United "States . . ."

Act of March 3, 1875 (18 U. S. Stats. 470. Rev. Stats. sec. 629).
As amended March 3, 1887 (24 U. S. Stats. 552),
As corrected Aug. 13, 1888 (25 U. S. Stats. 433).

The jurisdiction thus to be exercised is entirely independent of the question of citizenship. The jurisdictional value being present, and all the parties being citizens of the same State the pivotal question is, "Does this suit arise under the laws of the United States?" We concede that before the question can be answered in the affirmative, it must appear upon the face of the pleading presented by the party invoking jurisdiction that the suit arises under the federal laws. The bill of complaint in this case was twice amended, issue of fact having been joined and trial had on the second amended complaint appearing on pages 24–29 of the transcript of the record. The essential averments of this pleading may be epitomized.

1. That all parties are citizens of Idaho.
2. Ownership by plaintiff (subject to the paramount title of the United States) of the Kirby Fraction Lode Mining Claim.
3. Possession in plaintiffs of such claim.
4. The acts performed in perfecting the location of the claim and perpetuating their rights.
5. Survey by the defendant of the Shoshone mining claim overlapping the Kirby.
6. Filing by defendant in the local land office of such survey and application for patent for the Shoshone claim.
7. Filing in such land office by plaintiffs during the period of publication of an adverse claim based upon their ownership of the Kirby.

8. The staying of proceedings on defendant's patent application, awaiting the determination by a court of competent jurisdiction of the right of possession, and the bringing of this suit to secure such determination, within thirty days from the date of filing the adverse claim in the land office.
9. That by said patent proceeding and its prosecution by defendant, plaintiff's title to the Kirby is clouded and impaired.
10. The jurisdictional value.
11. Prayer for relief.

It is quite apparent upon the face of this pleading that this action was instituted pursuant to the requirement of the laws of the United States, prescribing the method of acquiring title by patent to mineral lands of the public domain. The provisions of these laws, so far as they are pertinent to the present inquiry, are contained in Section 2326 of the Revised Statutes and the Act of March 3, 1881. We quote for the purpose of convenient reference.

"SEC. 2326. Where an adverse claim is filed during the "period of publication, it shall be upon oath of the person "or persons making the same, and shall show the nature, "boundaries, and extent of such adverse claim, and all pro- "ceedings, except the publication of notice and making and "filing of the affidavit thereof, shall be stayed until the con- "troversy shall have been settled or decided by a court of "competent jurisdiction, or the adverse claim waived. It "shall be the duty of the adverse claimant, within thirty days "after filing his claim, to commence proceedings in a court of "competent jurisdiction, to determine the question of the "right of possession, and prosecute the same with reasonable "diligence to final judgment; and a failure so to do shall be a "waiver of his adverse claim. After such judgment shall "have been rendered, the party entitled to the possession of "the claim, or any portion thereof, may, without giving further "notice, file a certified copy of the judgment roll with the "Register of the Land Office, together with the certificate of "the Surveyor-General that the requisite amount of labor has "been expended or improvements made thereon, and the "description required in other cases, and shall pay to the "receiver five dollars per acre for his claim, together with "the proper fees, whereupon the whole proceedings and the "judgment roll shall be certified by the Register to the Com-

" missioner of the General Land Office, and a patent shall " issue thereon for the claim, or such portion thereof as the " applicant shall appear, from the decision of the Court, to " rightly possess. If it appears from the decision of the " Court that several parties are entitled to separate and differ- " ent portions of the claim, each party may pay for his portion " of the claim with the proper fees, and file the certificate and " description by the Surveyor-General, whereupon the Register " shall certify the proceedings and judgment roll to the Com- " missioner of the General Land Office, as in the preceding " case, and patents shall issue to the several parties according " to their respective rights. Nothing herein contained shall " be construed to prevent the alienation of a title conveyed by " a patent for a mining claim to any person whatever."

This was supplemented by the Act of March 3, 1881 (21 U. S. Stat. 505), which provides:—

" That if, in any action brought pursuant to Section 2326 of " the Revised Statutes, title to the ground in controversy " shall not be established by either party, the jury shall so " find, and judgment shall be entered according to the verdict. " In such case costs shall not be allowed to either party, and " the claimant shall not proceed in the Land Office or be " entitled to a patent for the ground in controversy until he " shall have perfected his title."

It would seem that the inquiry *Does the action arise under the laws of the United States?* is answered in the affirmative by the statute itself.

Counsel for the appellant urges the view that a case does not arise under the laws of the United States unless there is necessarily involved a disputed question of federal statutory interpretation upon the correct solution of which some asserted right depends; that in suits brought under Section 2326 of the Revised Statutes of the United States no such question necessarily or inferentially arises, but that the rights of the parties are to be determined from a consideration of disputed questions of fact. Therefore, as all the parties to this action are residents of the same State, the federal courts have no jurisdiction.

We respectfully submit that this view is radically erroneous. Counsel's conclusion is deduced from a false premise.

Cases arising under the laws of the United States are such

as *grow out* of the legislation of Congress whether they constitute the right, or privilege, or claim or defense of the party in whole or in part by whom they are asserted.

Tennessee v. *Davis*, 100 U. S. 257, 264;
Railroad Co. v. *Mississippi*, 102 U. S. 135, 141.

In such cases the federal courts have jurisdiction regardless of the question of citizenship.

Pope v. *Louisville New Albany Railway*, 173 U. S. 573.

We may cite several familiar instances of cases arising under the laws of the United States where no question of statutory interpretation whatever is involved:

(1) Corporations created under the laws of the United States may sue in the federal courts, regardless of any controverted question of statutory construction.

Pacific Railroad Removal Cases, 115 U. S. 1;
Texas and Pacific Railway Co. v. *Cody*, 166 U. S. 606.

(2) Assignees in Bankruptcy, under the Act of 1867, had the same privilege.

Lathrop, Assignee v. *Drake*, 91 U. S. 516.

Prior to the Revised Statutes the State and federal courts had concurrent jurisdiction of such actions.

Caflin v. *Houseman*, 93 U. S. 130.

An action by an assignee in bankruptcy to recover the assets of a bankrupt or set aside fraudulent transfers does not involve any question of controverted federal statutory interpretation—yet such actions arise under or *grow out* of the laws of the United States:

(2) Receivers appointed by the United States Courts may maintain in the federal courts any kind of action necessary to aid the performance of their trusts. Such actions likewise arise under the laws of the United States, and do not necessarily involve any questions of statutory interpretation.

Texas and Pacific Railway v. *Cox*, 145 U. S. 593.

Does the present action *grow out* of the laws of the United States?

The authority of Congress to legislate concerning the disposal of the public lands, to prescribe the terms and conditions under which they may be purchased and the methods by which title in fee may be transmitted is unquestioned. A glance at the public land laws shows that there is a material difference between the system devised for transferring title to public agricultural lands and that devised for those falling in the category of mineral. A brief comparison of the two systems will not be out of place.

The system devised by Congress regulating the disposal of all classes of public lands other than mineral confides to the Land Department, as a special tribunal created for that purpose, the duty of investigating and determining all conflicting claims without the aid or advice of the courts. With its discretionary powers the courts cannot interfere. Injunction will not lie to restrain it from acting, nor will mandamus issue to compel it to act.

Marquez v. *Frisbie*, 101 U. S. 473;
Litchfield v. *Richards*, 9 Wall. 575;
Gaines v. *Thompson*, 7 Wall. 347;
Cox v. *McGarrahan*, 9 Wall. 298.

Nor will the courts exercise any direct appellate jurisdiction for the purpose of reversing or correcting its errors.

Quinby v. *Conlan*, 104 U. S. 420;
Shepley v. *Cowan*, 91 U. S. 330.

"Until the legal title to public land passes from the Govern-
" ment, inquiry as to all equitable rights comes within the
" cognizance of the Land Department. In *United States* v.
" *Schurz*, 102 U. S. 378, 396, which was an application for a
" mandamus to compel the delivery of a patent, it was said,
" 'Congress has also enacted a system of laws by which
" 'rights to these lands may be acquired, and the title of the
" 'Government conveyed to the citizen. This Court has with
" 'a strong hand upheld the doctrine that so long as the legal
" 'title to these lands remained in the United States and the

" ' proceedings for acquiring it were as yet *in fieri*, the courts
" ' would not interfere to control the exercise of the power
" ' thus vested in that tribunal. To that doctrine we still
" ' adhere.' . . . So long as the legal title remains in the
" Government all questions of right should be solved by
" appeal to the Land Department and not to the courts. . . .
" the courts must as a general rule be resorted to only when
" the legal title has passed from the Government."

Brown v. *Hitchcock*, 173 U. S. 473, 476-8.

A suit in the courts instituted by one contesting the right of a homestead claimant to enter and receive a patent for a given tract of agricultural land is not known to our system of jurisprudence. There is no legal sanction for it, no law authorizing it.

A contesting agricultural claimant who is unsuccessful before the Land Department must bide his time until patent issues, and then seek to control the legal title if by mistake of law the Land Department has improperly awarded the land to the wrong person, or has attempted to act beyond the scope of its authority.

Actions of this character may be instituted in the federal courts regardless of the question of citizenship, as they arise under the laws of the United States.

Mitchell v. *Smale*, 140 U. S. 406;
Doolan v. *Carr*, 125 U. S. 618;
Spokane Falls and Northern Ry. v. *Zeigler*, 167 U. S. 65.
Walker v. *Richards*, 55 Fed. 129;
Linkswiler v. *Schneider*, 95 Fed. 203.

The methods devised by Congress for transmitting title of mineral lands to those qualified to purchase them is radically different. The equitable rights involved in the controversy over a mining claim, where patent is applied for and adverse claims are filed in the Land Office, are not determined by the Land Department, but are referred to the courts for final determination. Unless the action is brought, all asserted rights adverse to the patent applicant are waived and forever lost. The federal law *requires* the action to be brought, and within a

specified time, and fixes a penalty for a failure to bring it. From the time the adverse claim is filed until it is either abandoned or waived, the jurisdiction of the Land Department is suspended. If it attempts to act prior to the final determination of the litigation, its acts are void.

Richmond v. *Rose*, 114 U. S. 576, 584.

In the patent proceedings the courts act as an auxiliary tribunal, aiding the Land Department in determining the merits of the controversy and assisting the government in the administration of its public land system.

Perego v. *Dodge*, 163 U. S. 160, 167.

"If the Court decides for one party or the other the Land "Department is bound by the decision. If it decides that "neither party has established a right to the mine or any part "of it, this is equally binding as the case then stands."

Richmond v. *Rose*, 114 U. S. 576, 585.

This is by virtue of the *laws of the United States*. An examination of the adjudicated cases shows clearly that the action has been treated by the courts as one that is statutory—arising under the laws of the United States. It has been denominated by this Court an "action brought under a special stat-"ute of the United States," "a statutory action."

Bennett v. *Harkrader*, 158 U. S. 441, 447.

"The proceedings in this case commenced by the assertion "of the defendant's claim to have a patent issue to them for "the land in controversy. The next step was the filing of an "adverse claim by the plaintiffs in the land office, and the "present suit is but a continuation of those proceedings, "prescribed by the laws of the United States to have a "determination of the question as to which of the contesting "parties is entitled to the patent."

Wolverton v. *Nichols*, 119 U. S. 485, 488.

In Colorado actions of this character are held to be purely statutory.

Keeler v. *Trueman*, 15 Colo. 143, 146,

and the proceedings must be conducted in accordance with the Congressional law which authorizes them.

McGinnis v. *Egbert*, 8 Colo. 41, 55;

Manning v. *Strehlow*, 11 Colo. 451.

In other States and Territories similar views have been expressed.

Mattingly v. *Lewisohn*, 8 Mont. 259, 263;
McKay v. *McDougal* (Mont.) 48 Pac. 988, 992;
Mars M. Co. v. *Oro Fino M. Co.* 7 S. Dak., 605, 65, N. W. 19;
Iba v. *Central Association of Wyoming* (Wyo.), 42 Pac. 20;
Providence G. M. Co. v. *Burke*, (Ariz.), 57 Pac. 641.

This comparison of the two systems regulating the disposal of the two classes of public lands gives us this net result:

(1) In agricultural entries the courts perform no functions until after patent. Controversies then arising over the antecedent action of the Land Department are matters of federal cognizance regardless of the question of citizenship.

(2) In applications to patent mineral lands all contested questions of both fact and law are relegated to the courts whose judgments control and are the bases of final action by the Land Department. Necessarily in performing the functions, which in agricultural entries are performed by the Land Department, the rule and measure of decision controlling the courts are necessarily the laws of the United States. These matters are as essentially of federal cognizance, regardless of the question of citizenship, as they would be after patent in the case of agricultural entries.

Counsel for appellant seems either to confuse the class of actions contemplated by Section 2326 of the Revised Statutes with the ordinary actions to determine adverse claims to real property authorized by the various State laws or to intimate that in the absence of a diversity of citizenship this State statutory remedy is not only all sufficient, but that the State forum is the only court of competent jurisdiction.

We may briefly summarize our contentions as follows:

1. The action arises under the laws of the United States because it is required by those laws to be instituted and prosecuted to final judgment in aid of the Land Department, and as a part of the patent proceedings. The jurisdiction in cases of this character does not depend upon either the citizenship of the parties, or a controverted question of statutory interpretation.

2. The Federal and State Courts are, with reference to the forum in which this class of cases is to be litigated, courts of concurrent jurisdiction. The adverse claimant may seek either tribunal. If he select a State Court, the patent applicant may remove to the Federal Court, or may waive his right of removal and proceed to trial in the State Court. If the latter course is adopted, he will be barred from suing out a writ of error to the highest State Court unless a federal question, *i. e.*, a question of controverted federal statutory construction, appears upon the face of the record, and it is urged *at the trial.*

I.

Whenever the question of the jurisdiction of Federal Courts in cases of this character has been presented or discussed, whether directly or incidentally involved, these courts have uniformly upheld their right to entertain such jurisdiction. The cases (with the exception of two very recent ones) are cited and referred to in the prevailing opinion of the Circuit Court of Appeals. Justice Miller, sitting as Circuit Judge in the Eighth Circuit, first announced the doctrine eighteen years ago in *Frank* v. *Larimer*, 8 Fed. 724. We shall not attempt to add anything to the reasoning of the Circuit Court of Appeals in its reference to and treatment of the cases following the doctrine of *Frank* v. *Larimer*, contenting ourselves with their mere citation:—

Cheesman v. *Shreve*, 37 Fed. 36;

Doe v. *Waterloo Mining Co.*, 43 Fed. 219;

Strasburger v. *Beecher*, 44 Fed. 209, 213;
Burke v. *Bunker Hill & S. M. Co.*, 46 Fed. 644, 646;
Wise v. *Nixon*, 76 Fed. 3, 6.

In the opinion of the Circuit Court of Appeals sanction for the rule announced in these cases is found in the decisions of the Supreme Court of the United States.

Jackson v *Roby*, 109 U. S. 440;
Chambers v. *Harrington*, 111 U. S. 350.

Since the opinion in the case at bar was rendered by the Circuit Court of Appeals, Judge Wellborn, sitting as Circuit Judge in the Southern District of California, has, in our judgment, contributed something of value to the discussion of the question. After announcing the rule that where "federal question" is invoked in support of the jurisdiction of the Circuit Court, it must appear by the plaintiff's statement of his own claim: First, that an actual dispute exists between the parties as to the meaning of some constitutional provision or law of the United States; and, second, materiality of the construction of such provision or law to a determination of the cause, the Judge proceeds as follows:—

"An action brought pursuant to Sections 2325 and 2326 "Rev. Stats. U. S., where patent has been applied for and "adverse claimed filed, is said to be an apparent exception to "the rule above stated as to the essentials of a federal ques- "tion (citing cases, including those referred to by the Circuit "Court of Appeals, as well as the case at bar). These cases "are perhaps sustainable upon either one of the following "theories: First: That the suit referred to in said section is "but one step in a purely statutory procedure which has its "inception, not in the Court in which the suit is brought, but "in the Land Office. Second: Said Section 2326 Rev. St. "provides among other things that 'it shall be the duty of "'the adverse claimant within thirty days after filing his "'claim to commence proceedings in a court of competent "'jurisdiction, to determine the question of the right of pos- "'session, and prosecute the same with reasonable diligence "'to final judgment; and a failure so to do shall be a waiver "'of his adverse claim.' It cannot be supposed that Congress "would subject the adverse claimant to forfeiture of his "interest by reason of failure to institute suit without provid-

"ing a tribunal in which such claimant could sue as a matter "of right. Now, since Congress is powerless to confer juris- "diction on a State court, the presumption is a fair, if not "necessary, one that said statute confers jurisdiction on fed- "eral courts."

California Oil and Gas Co. v. *Miller*, 96 Fed. 13, 18.

The doctrine announced by the Circuit Court of Appeals in the case at bar has also been recently reiterated and reaffirmed.

McFadden v. *Mountain View M. & M. Co.*, 97 Fed. 670.

Nevada Sierra Oil Co. v. *Miller*, 97 Fed. 681.

Two propositions, it seems to us, are well settled.

First: In the administration of the public land system the States have no duty to perform. Whatever steps are prescribed for the acquisition of title to the public lands are prescribed by the paramount proprietor, and under the federal constitution Congress has the sole power to provide for the disposal of such lands.

Second: In the administration of this system Congress has no power to confer upon the State courts jurisdiction, or to compel such courts to perform auxiliary or ancillary functions in the disposal of the public lands. The jurisdiction of the State courts is referable to the constitution and laws of the State. It is true that the State courts, having competent jurisdiction in other respects, may be resorted to for the purpose of enforcing the federal laws, where such courts are not excluded by express provision or by incompatibility arising from the nature of the particular case. In such case the State courts do not exercise any new jurisdiction, but their ordinary jurisdiction derived from their constitution under the State law.

Claflin v. *Houseman*, 93 U. S. 130;

1 Bailey on Jurisdiction, Sec. 93.

Relief must be administered in a State court according to the procedure and the requirements of the State law. Congress has no right to dictate to the State court the form of a judgment which must be entered in a given action simply because the federal government desires to use it in aid of its

administration of the public land system. The danger of denying to adverse claimants of mining claims contesting patent application the right to invoke the jurisdiction of the federal courts lies in the possibility that the State courts may refuse the relief required by the act of Congress. Let us illustrate.

In administering the public mineral land laws the Land Department declines to give controlling effect to judgments of courts in actions which are not prosecuted under Section 2326 of the Revised Statutes.

The department will not be controlled by judicial proceedings instituted outside of the sanction of that section, nor will a judgment rendered in an ordinary action, by which we mean one wholly disconnected with the patent proceeding, be considered as aiding the department.

North Star Lode, 28 Land Dec. 41;
420 *M. Co.* v. *Bullion M. Co.*, 2 Copp's L. O. 5;
Seymour v. *Wood*, 4 Copp's L. O. 2;
Nichols v. *Becker*, 11 L. D. 8, 14;
Cain v. *Addenda Mining Company*, 24 L. D. 18, 20.

Suppose the State Courts decline to recognize the earmarks of a suit brought under this section of the Revised Statutes, or refuse to give a judgment in the form required by the federal law? The danger of it so doing is something more than chimerical. We quote from the decision of the Supreme Court of California, in illustration of this:—

"Under the State laws either party may bring an action to "determine an adverse claim, but the jurisdiction and the "procedure governing the action depends entirely upon our "State Constitution and laws. This action seems well adapted "to the object sought to be accomplished by the Congressional "law, for in it the rights of the parties are wholly determined "by the Acts of Congress and involve the same questions as "to the relative rights which the officers of the Land "Department would otherwise have been required to pass "upon. *But it does not matter to the State Court whether its "judgment can be made available in the Land Office or not.* . .

"The rights of the parties will be entirely determined by the "laws of the United States granting the right to enter upon "the mineral lands and to extract metals therefrom and to

" acquire title thereto, *but the suit must be tried in every respect* " *as though no contest was pending in the Land Office of the* " *United States in regard to the right to purchase the same.* The " Court would be *at liberty* to order a special verdict if that was " desired by the parties because it would be more serviceable " in the contest, for that may be done in any case and such " contingency is provided for in our practice."

Altoona Q. M. Co. v. *Integral Q. M. Co.*, 114 Cal. 100, 102, 103.

And in another case the same Court said:—

" The action was brought 'to determine the question of the " 'right of possession' of certain mining land, and that was the " only question involved. The Court had nothing to do with " the proceedings in the Land Office and no power to determine " as to their regularity or irregularity, sufficiency or " insufficiency."

Quigley v. *Gillett*, 101 Cal. 462.

Suppose an action is commenced in the State Court to determine such an adverse claim, and was in form ejectment, the adverse claimant being out of possession. Under the State laws the defendant in that class of actions might rely on the weakness of plaintiff's title, without the necessity of establishing his right to the land. But the federal law requires a judgment, as to whether *either* of the parties had complied with the Act of Congress, an investigation which we submit the State Court could not be compelled to make. The duty of the State Court under the State laws is fully performed when it determines that plaintiff has failed to make out a case. It is not concerned with anything beyond that.

It would seem, following the suggestion of Judge Wellborn heretofore quoted that Congress did not intend to close the door of the federal court to the adverse claimants, that being the only tribunal whose practice and procedure could be regulated by Congress, the only Court which had the power to investigate the regularity or irregularity of the proceedings in the Land Office, the only Court which could be legally charged with the power to render a decision in accordance with the laws of Congress and to so render it in form that it might be available in the Land Office and this as a matter of duty and not merely as a matter of *grace*.

If there is any doubt about the correctness of this position we submit that it should be resolved in favor of the construction given to the federal law by the federal courts for eighteen years. Under this construction judgments have been entered and patents issued for large acres of public mineral lands throughout the mining regions.

The only authority relied upon to confute this doctrine is the case of *Bushnell* v. *Crooke*, 148 U. S. 682, to which we will presently address ourselves.

2.

We do not contend that the federal courts have exclusive jurisdiction over actions of this character. Congress might make it exclusive, as the subject-matter *i. e.*, disposal of the public lands, is one with which Congress alone can deal.

> "Rights, whether legal or equitable, acquired under the laws "of the United States, may be prosecuted in the United States "Courts, or in the State Courts, competent to decide rights of "the like character and class; subject, however, to this quali- "fication, that where a right arises under a law of the United "States, Congress may, if it see fit, give to the the federal "courts exclusive jurisdiction."
>
> *Claflin* v. *Houseman*, 93 U. S. 130, 136.

That the States have concurrent jurisdiction with the Federal Courts for the enforcement of many rights arising under the laws of the United States is well settled.

Claflin v. *Houseman*, *supra*;

Wilcox v. *Luco*, 118 Cal. 642; 62 Am. St. Rep. 306;

Brinkerhoff v. *Bostwick*, 88 N. Y. 60.

That in actions brought under Section 2326 of the Revised Statutes the State Courts in the mining regions have always been open to suitors is undoubted. Such courts have so far as their State procedure permitted taken cognizance of the action, because it involved the right of possession to real estate. But this by no means proves that the Federal Courts have no jurisdiction unless diversity of citizenship exists.

The case of *Bushnell* v. *Crooke*, 148 U. S. 682, upon which Judge Gilbert of the Circuit Court of Appeals bases his dis-

senting opinion in the case at bar, and upon which counsel in this case relies for a reversal, was an action brought in the State Court based upon an adverse claim under 2326 of the Revised Statutes.

An examination of the record of that case filed in the Supreme Court of the United States, to which we invite the Court's attention (Record Case No. 13,787, October Term, 1892, No. 195), discloses the following: The parties litigant were citizens of different States, the plaintiff, Crooke Mining and Smelting Company, being a corporation organized under the laws of New York, and the defendants, Bushnell and others, being citizens of the State of Wisconsin. The action was commenced in the State Court, and, after the defendants had appeared and answered, plaintiff caused it to be removed to the Federal Court on the sole ground of diversity of citizenship (Record, fols. 37 and 38). In the Federal Court a motion was made by the defendants to remand to the State Court, the ground specified among others being the insufficiency of the bond filed by plaintiff on removal (fol. 42).

The Circuit Court remanded the cause *on the sole ground of the insufficiency of the bond* (fol. 44). There was no suggestion in the application for removal on the motion to remand or in the order remanding, of "federal question" or that the case arose under the laws of the United States. The case was tried in the State Court, appealed to the State Supreme Court and finally determined by that Court before there was any suggestion of "federal question."

Even in the petition for rehearing we failed to observe any such question properly stated. *The question under consideration in the case at bar was not raised, discussed or referred to anywhere in the entire record in the Bushnell-Crooke case nor in the arguments of either counsel. Not a single case cited in the majority opinion of the Circuit Court of Appeals in its decision in the case at bar was cited, referred to or commented on either by counsel in their briefs or by the Supreme Court of the United States in the Bushnell-Crooke case.*

Another significant fact shown by the record in the Bushnell case. Bushnell *resisted* federal jurisdiction in the first instance, caused the case to be remanded to the State Court, tried it without suggesting "federal question," was defeated and after final overthrow in the State Supreme Court came to the Supreme Court of the United States, as counsel for defendant in error said, "knocking at the doors of this Court and under "the pretense that some right or title claimed by them under "the federal law has been denied, assume that this Court has "jurisdiction of the case." And the contention was made that plaintiffs in error were estopped by their former conduct to invoke the jurisdiction of the Supreme Court of the United States.

If an adverse claimant under Section 2326 of the Revised Statutes commences his action in a State Court the defendant may remove to the Federal Court, because the case might have been originally instituted there. If he fails to do so, he waives his right to invoke the jurisdiction of the Federal Courts at any stage of the proceedings, unless during the trial, a federal question, by which I now mean a *controverted question of statutory interpretation*, becomes involved, and is asserted before judgment, and appears upon the face of the record. Unless so involved and asserted no writ of error will lie from the Supreme Court of the United States.

We do not have to go far afield for fitting analogies supporting this proposition.

As heretofore observed, under the National Bankrupt Act of 1867 and prior to the Revised Statutes, the State and Federal Courts had concurrent jurisdiction of suits for the settlement of conflicting claims to property belonging to the estate of a bankrupt. An assignee might sue in a State Court and collect the assets. If he submitted himself to the jurisdiction of the State Court he was bound by the judgment.

Claflin v. *Houseman*, 93 U. S. 130;
Mays v. *Fritton*, 20 Wall. 414;
McHenry v. *La Societe Francaise*, 95 U. S. 58.

Actions arising under the old Bankrupt law if commenced in a State Court might be removed to the Federal Court regardless of citizenship as they arose under the laws of the United States.

Connor v. *Scott*, 4 Dillon 242; Fed. cases, No. 3119;
Houser v. *Clayton*, 3 Woods 273; Fed. cases, No. 6739;
Woolbridge v. *McKenna*, 8 Fed. Rep. 650, 676.

A right of removal may be waived.

Hanover National Bank v. *Smith*, 13 Blatchf. 224; Fed. cases, No. 6035;
Home Ins. Co. v. *Curtis*, 32 Mich. 402.

Certainly, one having waived a right of removal or himself invoked the jurisdiction of the State Court or resisted removal to the Federal Court, where, as in the case at bar, the action upon its face arose under the laws of the United States, ought not to be allowed a writ of error from the Supreme Court of the United States.

A right of removal exists in case of diversity of citizenship. If a non-resident defendant failed to exercise the right, and suffered defeat in the highest State Court, he certainly would not be permitted to sue out a writ of error in the Supreme Court of the United States on the ground of diversity of citizenship. Some other ground of federal cognizance must have been asserted at the trial.

The pivotal point in the Bushnell-Crooke case assuming, for the purpose of argument, that the petition for rehearing addressed to the Supreme Court of Colorado, showed the existence of a "federal question," *i. e.*, controverted question of statutory interpretation, was undoubtedly the fact that the suggestion came *too late*. This is manifest from a reading of the decision in this Court and authorities there cited (148 U. S., p. 689). The record must show that the right was claimed in the trial Court.

Brooks v. *Missouri*, 124 U. S. 394.

The doctrine has been reiterated by this Court at its present term.

Scudder Administrator v. *Coler*, No. 55, Oct. T., 1899; decided Oct. 30, 1899.

We think we may safely assert that this Court never intended to overthrow the doctrine announced by the Circuit Court of Appeals in this case and the precedents upon which it is based, a rule that had been uniformly followed for eighteen years in the Federal Courts of the mining regions, and under which rights to mining properties of incalculable value have been litigated, tried and determined.

If the Court had any such intention it would have manifested it unequivocally. The truth is apparent. Neither the litigants, counsel or the Court ever thought of the question as it is here presented. This we submit effectually disposes of this branch of the case.

II.

EQUITY JURISDICTION.

Is the action arising out of the patent proceeding instituted pursuant to the provisions of Section 2326 of the Revised Statutes, when prosecuted in the Federal Courts, an action at law or in Equity?

It seems to us that this question is set at rest by the decisions of this Court. In an action prosecuted in the territorial courts of Montana, arising out of the patent proceeding wherein the pleadings were substantially the same as in the case at bar, this Court said:—

"As seen by this statement the suit is brought for special "relief, and the judgment entered is such as a court exercis- "ing jurisdiction in equity alone could render."

Hammer v. *Garfield M. Co.*, 130 U. S. 295.

It seems to us that the true character of the action is aptly stated by Circuit Judge Ross:—

" The sole object of the proceeding in court is the deter-
" mination of the contest that arose in the Land Office, the
" point of which is, which of the applicants, if either, is
" entitled to receive the patent from the government. The
" right of possession referred to in the statute, under consid-
" eration, is not the right which flows from and is a part of
" the title or ownership of private land, and which is enforced
" in an action of ejectment by the recovery of the land. It
" has no relation to such a right, but it is the right that flows
" from a compliance with the laws prescribed by Congress for
" the acquisition of the government patent for mineral lands.
" Such a right never was, and never could be, the subject of
" any common law action, and its determination, therefore, on
" the equity side of the court, cannot be as argued for defend-
" ant, a violation of that provision of the constitution which
" declares that the right of trial by jury shall be secured to
" all and remain inviolate forever."

Doe v. *Waterloo Min. Co.*, 43 Fed. 219, 221.

This question was recently before the Supreme Court of Arizona where a like doctrine was announced.

Providence Gold Min. Co. v. *Burke*, 57 Pac. 641, 643.

Appellants complain that if the action had been tried in the State court under the Idaho Statute they would have been entitled to a jury. By the ruling of the Federal Court (holding it to be a case in equity), they were denied that right. In the first place, they never demanded a trial by jury in the Federal Court. In the next place, the case was not instituted or tried under the Idaho Statute. Counsel for appellant lays some stress on the fact that the Statutes of Idaho providing for the determination of conflicting claims to real estate has been determined by the Supreme Court of that State to be an action at law, and that the Federal Courts are bound by the interpretation given by the highest court of the State to a *State* Statute. That may be true, but, as heretofore suggested, this action was not prosecuted under a State Statute, but under a law of Congress. In addition to this:—

" It may well be affirmed that a State, by prescribing an
" action at law to enforce even statutory rights, cannot oust a
" Federal Court, sitting in equity, of its jurisdiction to enforce
" such rights, provided they are of an equitable nature."

Sheffield Furnace Co. v. *Withrow*, 149 U. S 574, 579.

"A construction therefore that would adopt the State "practice in all its extent would at once extinguish in such "States the exercise of equitable jurisdiction. The Acts of "Congress have distinguished between remedies at common "law and in equity, yet this construction would confound "them. The Court therefore thinks that to effectuate the "purposes of the Legislature the remedies in the Courts of "the United States are to be at common law or in equity, "not according to the practice of the State Courts, but "according to the principles of common law and equity as "distinguished and defined in that country from which we "derive our knowledge of these principles."

Robinson v. *Campbell*, 3 Wheat. 212, 222;
Quoted in *Sheffield Furnace Co.* v. *Whithrow*, *supra*.

Suits in which relief is sought according to the priniciples of equity and practice in equity cases are "cases in equity."

Robinson v. *Campbell*, 3 Wheat. 212;

U. S. v. *Howland*, 4 Wheat. 108;

Lorman v. *Clarke*, 2 McLean, 568; Fed. cases, No. 8516;

Gordon v. *Hobart*, 2 Sumn. 401; Fed. cases, No. 5609;

Pratt v. *Northam*, 5 Mason, 95; Fed. cases, No. 11,376;

Cropper v. *Colburn*, 2 Curt. 465; Fed. cases, No. 3416.

"We think the rule is settled in this Court that whenever a "new right is granted by statute, or a new remedy for viola- "tion of an old right, or whenever such rights and remedies are "dependant on State Statutes or Acts of Congress, the juris- "diction of such cases as between the law side and the equity "side of the Federal Courts must be determined by the "essential character of the case, and unless it comes within "some of the recognized heads of equitable jurisdiction it "must be held to belong to the other."

Van Norden v. *Morton*, 99 U. S. 378, 380.

The action at bar was brought by a party alleged to be the owner, subject to the paramount title of the United States and to be in possession to determine an adverse claim to the premises in dispute. Eliminating from consideration the averments of the bill concerning the proceedings in the Land Office, the pleading is an action to quiet title against one asserting a hostile right. Actions to quiet title can only be maintained in the Federal Courts where the plaintiff is in possession, or where both parties are out of possession,

notwithstanding the *State Statute* permits its maintenance regardless of possession.

Clark v. *Smith*, 13 Pet. 185, 202;
Holland v. *Challen*, 110 U. S. 15;
Whitehead v. *Shattuck*, 138 U. S. 146;
Davidson v. *Calkins*, 92 Fed. 230.
Balmear v. *Otis*, 4 Dill. 558;

The decree in the case at bar determines that the appellees, plaintiffs below, were in possession as they alleged. Counsel's assertion that *both* parties were in possession is not only a solecism, but is also not justified by the record.

Bills of peace, *quia timet* or to quiet title, are recognized in the Federal Courts as "cases in equity," notwithstanding the fact that in the State Court they may be at law or in equity.

In *McConihay* v. *Wright*, 121 U. S. 201, 206, which was an action to quiet title to certain real estate, it was objected that the case was not one of equitable jurisdiction, because by a Statute of West Virginia the complainant might have maintained an action of ejectment. The Court said:—

"Admitting this to be so, it, nevertheless, cannot have the "effect to oust the jurisdiction in equity of the Courts of the "United States as previously established. That jurisdiction, "as has often been decided, is vested as a part of the judicial "power of the United States in its Courts by the Constitution, and Acts of Congress in execution thereof. Without "the assent of Congress that jurisdiction cannot be impaired "or diminished by the Statutes of the several States regulating the practice of their own courts. Bills *quia timet* such "as the present belong to the ancient jurisdiction in equity, "and no change in State legislation, giving in like cases "a remedy by action at law can of itself curtail the jurisdiction in equity of the Courts of the United States. The "adequate remedy at law, which is the test of equitable jurisdictions in these courts, is that which existed when the "Judiciary Act of 1789 was adopted, unless subsequently "changed by Act of Congress."

Upon questions of this character, depending upon the general principles of equity jurisprudence, the Court does not hold itself bound by the decisions of the highest court of the

State in which the land in question was, but will be governed by its own view of these principles.

Russell v. *Southard*, 12 How. 138, 147.

It has been at times urged that in passing the Act of March 3, 1881, supplementing the Revised Statutes Congress by using the term *jury* in the phrase "that if in any action brought "pursuant to Section 2326 of the Revised Statutes, title to "the ground in controversy shall not be established by either "party, the *jury* shall so decide," intended to give to the action a purely legal character. This Court has fully disposed of that question as follows:—

"We do not regard the Act of March 3, 1881, as intended "to require or requiring all suits under Section 2326 to be "actions at law and to be tried by a jury."

Perego v. *Dodge*, 163 U. S. 160, 168.

Counsel for appellants also assert (although for what purpose we fail to observe) that the estate in an unpatented mining claim is a legal estate, a legal title, not an equitable title.

It is conceded that in all ordinary actions between individuals the estate conferred by a valid perfected mining location is classified as an estate of freehold, or fee simple, by reason of the acquiescence of the paramount proprietor in State decisions so determining long prior to the enactment of the mining laws, as well as by reason of the Act of Congress which provides, "that no possessory action between indivi- "duals in any of the courts of the United States for the recovery "of any mining title or for damages to such title, shall be "affected by the fact that the paramount title to the land on "which such mines are, is in the United States, but each "case shall be adjudged by the law of possession."

Rev. Stats. Section 910.

All ordinary actions may be predicated upon it as upon a legal title. But in the proceeding instituted in the Land Office, for the purpose of obtaining a patent, the asserted title is purely equitable. The federal mining laws provide for three classes of title.

(1.) Possessory: a location prior to entry and payment.
(2.) Complete equitable: a location after entry and payment and before patent.
(3.) Fee simple: after patent.

Benson M. & S. Co. v. *Alta M. & S. Co.*, 145 U. S. 428, 430.

It seems to us absurd to say that in the patent proceeding a mining claimant has a legal title as against the paramount proprietor. The object of the proceeding is to divest that proprietor of the legal title.

But conceding the title to be a legal one for all purposes the equitable action *quia timet* or to quiet title as to ordinary real estate is necessarily predicated upon a legal title and strictly so. No decree in such an action can be based upon an equitable title.

We think there can be no question but that the action at bar was properly brought on the equity side of the Court and that the rule announced by the Circuit Court and by the Circuit Court of Appeals in this case and by the Circuit Court in *Doe* v. *Waterloo*, 43 Fed. 219 and *Preston* v. *Hunter*, 67 Fed. 996, is in harmony with the decisions of the Supreme Court of the United States.

III.

VALIDITY OF THE KIRBY LOCATION.

Necessarily the validity of the Kirby location must be determined from a consideration of the facts and *all* the facts. This being an equity case, the Appellate Court might take the whole case "by its four corners" (if the record were before it), and review the action of the lower court, as to its conclusions upon these matters of fact. But all that this Court has before it is a "*statement on appeal*," something unknown to the equity practice in the Federal Courts. The certificate to this statement on appeal (Transcript, 175) discloses the fact that it was presented by appellants' counsel, with a request for its settlement. That the appellees declined to propose any amendments to it; but insisted that the entire testimony be substituted for the "statement" in accordance with the

equity practice. Thereupon the trial court settled the statement; but ordered that the reporter's statement of the testimony and proceedings had at the trial "shall go with the "record as a part hereof, but not to be printed, to the said "court of appeals, where it may be used by either party or "the Court." While this might have answered so far as the Circuit Court of Appeals was concerned, no such order is made so far as the present appeal is concerned, and there is as a matter of law no record now before this Court from which it can determine whether the conclusions upon questions of fact were properly reached or not. It must, we respectfully submit, necessarily follow that, if the jurisdictional questions heretofore discussed are resolved in appellees' favor, they are entitled to an affirmance of the judgment without considering the remaining questions presented by counsel in their opening brief. With this suggestion and protest we will briefly present our views on these remaining questions.

A.

Was the ground covered by the "Kirby" subject to location?

It is claimed that at the time the "Kirby" was located there was a prior subsisting location called the "Edith" covering part of the same ground. Therefore no rights were acquired by locating the "Kirby."

The facts are simple. The Edith was located by Day, Sullivan, Johns, and Charlebois on June 15, 1886. Subsequently and on the 11th day of July of the same year, in order to include more ground, the *same parties* located the ground covered by the Edith and the additional ground and called it the Kirby. The Shoshone, claimed by appellants' grantor, was not located *until eight years afterwards*. How the locators of the Shoshone were injured by the relocation of the Edith by the grantors of the appellees under the name of the Kirby, is beyond our conception. This question is fully and completely disposed of in the opinion of both the trial and appellate courts, and anything we might add would be superfluous.

B.

Was there a sufficient discovery within the limits of the Kirby upon which to predicate a location?

The trial Court found necessarily that there was a sufficient discovery, and in this the Appellate Court concurred. We are content with the exposition of the law as laid down by the Circuit Court of Appeals on this branch of the case.

Transcript, p. 254.

Many of the assignments of error appearing in the record on the appeal to the Circuit Court of Appeals, as well as on this appeal, are directed to the *opinion* of the trial Court. We submit that none of these specifications deserve consideration.

That assignments of error directed to the opinion of the trial Court will not be considered on review is certainly well settled so far as the Circuit Court of Appeals is concerned.

Mutual Reserve Fund Life Ass'n. v. *DuBois*, 85 Fed. 586;
Russel v. *Kern*, 69 Fed. 94;
North American L. & T. Co. v. *Colonial and U. S. M.Co.*, 83 Fed. 796;
Evans & Suess Ornamental Glass Co., 83 Fed. 706.

It is submitted that this Court will not consider on this appeal matters which the Circuit Court of Appeals could not consider on the appeal from the trial Court.

C.

If we assume that a discovery was not made until after the other acts of location were performed but was made long prior to the inception of any subsequent location, would such discovery be valid as against the subsequent locator?

We submit that it would most assuredly. How is the subquent locator injured? What difference is it to him, when the discovery was made, if it was made before he made a location?

The order in which the several acts required by law are to be performed is non-essential in the absence of *intervening* rights.

Perego v. *Erwin*, 85 Fed. 904;
Erwin v. *Perego*, 93 Fed. 608;

Thompson v. *Spray*, 72 Cal. 528;
Gregory v. *Pershbaker*, 73 Cal. 109, 116, 117.

All that is required is that a discovery should be made prior to the *inception* of intervening rights.

Erwin v. *Perego*, 93 Fed. 608;
Perego v. *Erwin*, 85 Fed. 904;
Fisher v. *Seymour*, 49 Pac. 30, 33;
Patchen v. *Keeley*, 19 Nev. 404, 415;
North Noonday v. *Orient*, 6 Sawy. 299, 309;
Jupiter M. Co. v. *Bodie Cons. M. Co.*, 7 Sawy. 96, 109;
Wright v. *Taber*, 2 Land Dec. 738, 743;
In re Mitchell, 2 Land Dec. 752.

As was said by the Circuit Court of Appeals:—

"There is no good reason why the owners of the Kirby "should be deprived of the discoveries made by them in "prosecuting the work thereon after the location was made "and prior to the time of the location of the Shoshone claim." Trans., fol. 524, p. 255.

Counsel for appellant in discussing this branch of the case quote from the syllabus to *Van Zandt* v. *Argentine Min. Co.*, 2 McCrary, 159, and state that this case was affirmed by the Supreme Court of the United States (122 U. S. 478). With regard to this case we have the following observations to make:

(1). The case passed upon by the Supreme Court of the United States was *not* the case cited by counsel. The one which this Court *did* pass upon is reported in 5 McCrary, 639, re-reported in 89 Fed. 583. The point here under discussion is not mentioned in either court.

(2). The quoted syllabus is much broader than the decision. The case is also reported in 8 Fed. 725, with an altogether different syllabus.

(3). In the case as reported in 2 McCrary, there was an *intervening* claimant asserting rights acquired before the senior locator made his discovery.

The other cases cited by counsel do not militate against the rule for which we are contending.

IV.

The right of Rutter and Bradley to maintain the action. Were they the real parties in interest? Was the evidence by which appellant sought to show that they were not, admissible?

Rutter and Bradley, appellees, were the grantees of the Kirby by mesne conveyances of record from the original locators (the Shoshone Mining Company, appellant, claimed nothing from this source of title). A party holding the paper title is the "real party in interest." This rule is as ancient as the common law, and citation of authorities is unnecessary. An attempt was made to show that F. W. Bradley, as agent of the Bunker Hill & Sullivan Mining and Concentrating Company, had made certain affidavits of performance of annual labor through several years, wherein it was recited that that company was the owner of the Kirby and had performed the assessment work during these years.

The affidavits were inadmissible for any purpose. They could not divest a title regularly transmitted by written conveyances; they were *res inter alios acta*, and altogether devoid of legal value in this case. The same may be said of the attempt to prove by parol—on cross-examination of Bradley—that he did not own the Kirby ground, after written conveyances had been introduced, showing transmission of title to him and his co-tenant, Rutter. The Circuit Court of Appeals did not consider the suggestion of appellants in the matter as deserving of mention.

V.

Perpetuation of the estate in the Kirby by performance of the annual labor.

The proof showed that annual work was done for and under the sanction of the owners. All that was attempted to be shown by the evidence sought to be introduced on this subject, to the evidence of which counsel for appellant noted an exception, was that the work was performed by the Bunker

Hill & Sullivan Co. and not by Bradley and Rutter. It was not claimed that work was done by that company in hostility to them. It is probable, considering the affidavit of Bradley as agent of the company, that some privity existed between Rutter and Bradley and that company. It will be presumed that even if work was done by the Bunker Hill Company it was done in subordination to the title of Rutter and Bradley. No attempt was made to show that the work was done by a mere trespasser.

It is well settled that work done for the benefit of the claim by one holding the equitable title will operate to preserve the claim from forfeiture and inure to the benefit of the claim.

Book v. *Justice M. Co.*, 58 Fed. 106, 118;

Jupiter M. Co. v. *Bodie Cons. M. Co.*, 7 Sawy. 96, 115;

Nesbitt v. *De Lamar's Nev. M. Co.* (Nev.), 52 Pac. 609, 610.

The Circuit Court of Appeals found no error in the rulings of the trial court with regard to the annual assessment work. And we fail to see anything in the argument of counsel for appellant requiring from us further mention.

VI.

Appellant's title to the Shoshone mining claim.

The trial court as well as the Circuit Court of Appeals having found that the Kirby was in all respects a valid location, based upon a sufficient discovery made long prior to the attempted location of the Shoshone, under which appellant asserts title, any discussion as to the merits or demerits of the Shoshone location, is superfluous. A discussion which must necessarily be speculative—or tentative at best—seems to us should be avoided. There is only one point in this connection which we are inclined to mention.

It was admitted that the discovery of the Shoshone was made underneath the surface at great depth and upon a vein which had its apex within other locations. The trial court

very naturally announced that it did not propose to decide just where the extralateral boundary planes were of the claims covering the apex, as they were not involved in this action. But it was quite evident and it was conceded that the Shoshone did not have the apex of the vein upon which the discovery was made. As every foot of the apex was covered by other claims — some overlapping and conflicting with each other — it is quite rational to assume that the extralateral right of some of them, if not several of them, included the point of the Shoshone discovery. While we do not think the questions are properly involved in this case, we respectfully submit that the following propositions of mining law are well settled:—

FIRST. A location cannot be made on the middle part of a vein or otherwise than on the top or apex.

Larkin v. *Upton*, 144 U. S. 19, 21;
Colorado Central C. M. Co. v. *Turck*, 50 Fed. 888, 895;
S. C. on rehearing, 54 Fed. 262, 267;
Iron S. M. Co. v. *Murphy*, 2 McCrary, 121;
Stevens v. *Williams*, 1 Morr. Min. Rep. 557;
Leadville M. Co. v. *Fitzgerald*, 4 Morr. Min. Rep. 380.

SECOND. Where the apex of a vein has once been embraced within a regular valid location, the estate in the vein throughout its entire depth between the extended end line planes is of the same dignity as that of the surface.

The grant of the right of lateral pursuit is in legal effect a severance of the estate in the vein throughout its entire depth from the ownership of the soil into which it penetrates after passing beyond the vertical planes drawn through the surface side boundaries of the location.

Waterloo M. Co. v. *Doe*, 82 Fed. 45, 50.

The vein in its descent passing out of and beyond vertical planes drawn through the surface boundaries embracing the apex is as much a part of the location as if entirely within its surface lines.

Tyler Min. Co. v. *Last Chance*, 90 Fed. 15, 21.

The Shoshone Company admits that it has no part of the apex, and the inference is irresistible that its so-called deep discovery was upon a segment of the vein which was the property of some one else.

It could no more predicate a location made on a discovery upon the dip of the vein within the extralateral right of a prior locator than it could base such a location upon a discovery within the surface limits of such prior location.

Counsel for appellant devote some considerable space to the discussion of a so-called patent survey of the Kirby — which survey reformed the lines of the location—so that the alleged Shoshone discovery was without the Kirby ground as surveyed.

There are several criticisms to be passed upon this suggestion.

FIRST. The so-called official survey was not made by the owners of the Kirby.

SECOND. It was never used as the basis of a patent application. No amended location was ever made subsequent to the date of the Kirby location. The only muniment of paper title was the Kirby location notice. Merely making a survey, which is never used as a basis of asserted title which is not recognized or adopted by the owners, cannot operate to divest rights which are acquired by the perfection of a valid location. Deputy Mineral Surveyors cannot make locations, nor by their surveys destroy or limit the ownership of claims which they are called upon to survey. Abandonment is a question of intention. No intent to abandon will be presumed. It must be clearly established. We submit that there is nothing in the record disclosing any such intention. All the acts of the owners negative it.

AS TO CASE NO. 102.

As indicated at the opening of this brief, the second of the consolidated cases numbered 102 in the trial Court arose out of an application by Rutter and Bradley, appellees, for a patent to the Kirby. The Shoshone Company appellant claiming to own the Ibex location adversed this application in the Land Office, and in due time brought suit in the State Court under Section 2326 of the Revised Statutes. The defendants, Rutter and Bradley, removed the case into the United States Circuit Court, District of Idaho, on the ground that the action arose under the laws of the United States. No motion to remand having been made, the case was tried, and subsequently consolidated for purposes of appeal with Case No. 81.

The principal questions heretofore presented when considering Case No. 81 are also urged with reference to the second case. It is unnecessary to add anything to what we have already said, further than to suggest that if the Circuit Court and the Circuit Court of Appeals were correct in their views that this class of actions arise under the laws of the United States, and therefore that the Federal Courts have jurisdiction regardless of the question of citizenship, it follows as a corollary that if commenced in the State Court they may be removed to the Federal Court.

There are no errors assigned on this appeal, which are directly referable to this Kirby-Ibex case now under consideration. The trial Court and Circuit Court of Appeals considered the questions in both cases to be practically the same, and having reached conclusions favorable to appellees in the first case, a like result followed in the second.

Counsel for appellants devotes some considerable space to the discussion of the extralateral rights of the "Stemwinder," a discussion which, it seems to us, considering the views of the trial Judge as expressed in his opinion, is somewhat profitless.

We quote from Judge Beatty's opinion :—

" While I am inclined to think that the Stemwinder and " and the other claims named have such extralateral rights " as will include this vein under the 'Shoshone,' I do not " think that question can be determined in this case without " further testimony, but it may be said that if there is any " portion of the ledge within the 'Shoshone' which is not " covered by their extralateral rights, it will belong to the " 'Shoshone' if this latter claim is not void as against the " Kirby."

Transcript of Record, fol. 69, p. 32.

Having found that the " Shoshone " was void as against the Kirby, the question mooted was eliminated out of the case. The extent of the extralateral right of the Stemwinder is a question too important and complicated to be discussed tentatively upon the meagre record now before this Court. It is now being litigated in a suit pending before the same Court which tried the case at bar. The solution of that question should, we submit, be left for determination in the case where it is directly and necessarily involved.

Counsel criticize the local land office for receiving the patent applications of Rutter and Bradley for the Kirby, while the adverse suit with the Shoshone remained undetermined. We may admit that this was a species of unadulterated folly, but no more so than this suit predicated upon the adverse claim filed by appellant in opposition to such application. If the Land Department was without jurisdiction to receive the application, why was the adverse claim filed or this suit commenced? Appellant commenced this action, not appellees. That such action was commenced, maintained, and prosecuted to final judgment by appellant is not assigned as error here, and no attack is made on the judgment on that ground. No plea of " former action pending " was interposed and the case has been disposed of on its merits.

We think we have fully answered all questions presented by counsel for appellant which have any legal bearing upon the case at bar. We think we have also answered and satisfac-

torily disposed of some other questions which, in our judgment, have been unnecessarily injected into the case.

We respectfully submit that the judgment of the Circuit Court of Appeals should be affirmed.

CURTIS H. LINDLEY,
Solicitor for Appellees.

SHOSHONE MINING COMPANY *v.* RUTTER.

177 505
L-ed 864
179 339

177 505
178 538

177 505
L-ed 864
f 180 534
104 f 594

177 505
L-ed 864
109 f 101
109 f 507

177 50
44 L-ed 86
184 *51
185 * 4

177 505
44 L-ed 864
s 20 SC 726
188 *186
188 *640

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 208. Argued March 21, 1900. — Decided April 30, 1900.

A suit brought in support of an adverse claim under Rev. Stat. §§ 2325, 2326, is not a suit arising under the laws of the United States in such a sense as to confer jurisdiction on a Federal court, regardless of the citizenship of the parties.

Blackburn v. *Portland Gold Mining Co.*, 175 U. S. 571, reëxamined and affirmed to this point.

Although suits like the present one may sometimes so present questions arising under the Constitution or laws of the United States that a Federal court will have jurisdiction, yet the mere fact that a suit is an adverse suit, authorized by the statutes of Congress, is not, in and of itself, sufficient to vest jurisdiction in the Federal courts.

THE case is stated in the opinion.

Mr. W. B. Heyburn for appellant. *Mr. Lyttleton Price* was on his brief.

Mr. Curtis H. Lindley for appellees.

MR. JUSTICE BREWER delivered the opinion of the court.

In *Blackburn* v. *Portland Gold Mining Company*, 175 U. S. 571, decided January 8, 1900, we held that a suit brought in support of an adverse claim under sections 2325 and 2326 of the Revised Statutes was not a suit arising under the laws of the United States in such a sense as to confer jurisdiction on a Federal court, regardless of the citizenship of the parties. In this case the same question is again presented, and has been elaborately argued by counsel against the opinion we then announced. Its importance, as well as the great ability with which it was argued by counsel for appellee, have induced a careful reëxamination of the question. While it may be con-

ceded that the matter is not free from doubt, nevertheless our reëxamination has not led us to change our former views. We deem it unnecessary to restate all the reasons given in the opinion then delivered, and yet some matters may appropriately be noticed.

By the Constitution (art. 3, sec. 2) the judicial power of the United States extends "to all cases, in law and equity, arising under this Constitution, the laws of the United States" and to controversies "between citizens of different States." By article 4, s. 3, cl. 2, Congress is given "power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." Under these clauses Congress might doubtless provide that any controversy of a judicial nature arising in or growing out of the disposal of the public lands should be litigated only in the courts of the United States. The question, therefore, is not one of the power of Congress, but of its intent. It has so constructed the judicial system of the United States that the great bulk of litigation respecting rights of property, although those rights may in their inception go back to some law of the United States, is in fact carried on in the courts of the several States. It has provided that the Federal courts shall have exclusive jurisdiction of admiralty and patent litigation, and jurisdiction concurrent with the state courts of suits arising under the Constitution or laws of the United States. Rev. Stat. § 629; 25 Stat. 433, c. 866.

When in section 2326, Rev. Stat., Congress authorized that which is familiarly known in the mining regions as an "adverse suit," it simply declared that the adverse claimant should commence proceedings "in a court of competent jurisdiction." It did not in express language prescribe either a Federal or a state court, and did not provide for exclusive or concurrent jurisdiction. If it had intended that the jurisdiction should be vested only in the Federal courts, it would undoubtedly have said so. If it had intended that any new rule of demarcation between the jurisdiction of the Federal and state courts should apply, it would likewise undoubtedly have said so. Leaving the matter as it did, it unquestionably meant that the competency of

the court should be determined by rules theretofore prescribed in respect to the jurisdiction of the Federal courts. In that view, if the adverse suit were between citizens of different States, and the value of the thing in controversy exceeded $2000, then by virtue of the general provisions of the statutes the Federal courts might take jurisdiction, or, if the suit was one arising under the Constitution or the laws of the United States, and the amount in controversy was over $2000, then also the Federal courts might take jurisdiction. Conversely, it would be true that if the amount in controversy was not in excess of $2000, or if the parties were not citizens of different States, and the suit was not one arising under the Constitution or laws of the United States, the Federal courts could not take jurisdiction.

In the present case diverse citizenship does not exist. Jurisdiction must, therefore, depend upon the question whether the suit is one arising under the Constitution or laws of the United States.

We pointed out in the former opinion that it was well settled that a suit to enforce a right which takes its origin in the laws of the United States is not necessarily one arising under the Constitution or laws of the United States, within the meaning of the jurisdiction clauses, for if it did every action to establish title to real estate (at least in the newer States) would be such a one, as all titles in those States come from the United States or by virtue of its laws. As said by Mr. Chief Justice Waite, in *Gold Washing & Water Co.* v. *Keyes*, 96 U. S. 199, 203:

"The suit must, in part at least, arise out of a controversy between the parties in regard to the operation and effect of the Constitution or laws upon the facts involved. . . . Before, therefore, a Circuit Court can be required to retain a cause under this jurisdiction, it must in some form appear upon the record, by a statement of facts, in legal and logical form, such as is required in good pleading, that the suit is one which 'really and substantially involves a dispute or controversy' as to a right which depends upon the construction or effect of the Constitution or some law or treaty of the United States."

The adverse suit (Rev. Stat. sec. 2326) is "to determine the question of the right of possession." That right may or may

not involve the construction or effect of the Constitution or a law or treaty of the United States. By sections 2319, 2324 and 2332, Revised Statutes, it is expressly provided that this right of possession may be determined by "local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States;" or "by the statute of limitations for mining claims of the State or Territory where the same may be situated." So that in a given case the right of possession may not involve any question under the Constitution or laws of the United States, but simply a determination of local rules and customs, or state statutes, or even only a mere matter of fact.

The recognition by Congress of local customs and statutory provisions as at times controlling the right of possession does not incorporate them into the body of Federal law. Section 2 of article I of the Constitution provides that the electors in each State of members of the House of Representatives "shall have the qualifications requisite for electors of the most numerous branch of the state legislature," but this does not make the statutes and constitutional provisions of the various States in reference to the qualifications of electors parts of the Constitution or laws of the United States.

On August 8, 1890, Congress enacted (26 Stat. 313, c. 728) that intoxicating liquors transported into any State or Territory "shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory," etc., and in *In re Rahrer*, 140 U. S. 545, 561, this court said:

"Congress has not attempted to delegate the power to regulate commerce, or to exercise any power reserved to the States, or to grant a power not possessed by the States, or to adopt state laws."

In *Miller's Executors* v. *Swann*, 150 U. S. 132, 136, it appeared that the State of Alabama had passed an act containing this provision: "The said Alabama and Chattanooga Railroad Company shall have the privilege and right of selling said lands or any part thereof in accordance with the acts of Congress granting the same," and it was held:

"The question is not what rights passed to the State under

the acts of Congress, but what authority the railroad company had under the statute of the State. The construction of such a statute is a matter for the state court, and its determination thereof is binding on this court. The fact that the state statute and the mortgage refer to certain acts of Congress as prescribing the rule and measure of the rights granted by the State, does not make the determination of such rights a Federal question. A State may prescribe the procedure in the Federal courts as the rule of practice in its own tribunals; it may authorize the disposal of its own lands in accordance with the provisions for the sale of the public lands of the United States; and in such cases an examination may be necessary of the acts of Congress, the rules of the Federal courts, and the practices of the land department, and yet the questions for decision would not be of a Federal character. The inquiry along Federal lines is only incidental to a determination of the local question of what the State has required and prescribed. The matter decided is one of state rule and practice. The facts by which that state rule and practice are determined may be of a Federal origin."

Inasmuch, therefore, as the "adverse suit" to determine the right of possession may not involve any question as to the construction or effect of the Constitution or laws of the United States, but may present simply a question of fact as to the time of the discovery of mineral, the location of the claim on the ground, or a determination of the meaning and effect of certain local rules and customs prescribed by the miners of the district, or the effect of state statutes, it would seem to follow that it is not one which necessarily arises under the Constitution and laws of the United States.

As against this we are met by these suggestions: First, that a corporation created by Congress has a right to invoke the jurisdiction of the Federal courts in respect to any litigation which it may have, except as specifically restricted by some act of Congress. *Osborn* v. *Bank of United States*, 9 Wheat. 738; *Pacific Railroad Removal Cases*, 115 U. S. 1. The argument of Chief Justice Marshall in support of this was, briefly, that a corporation has no powers and can incur no obligations except as authorized or provided for in its charter. Its power to do

any act which it assumes to do, and its liability to any obligation which is sought to be cast upon it, depend upon its charter, and when such charter is given by one of the laws of the United States there is the primary question of the extent and meaning of that law. In other words, as to every act or obligation the first question is whether that act or obligation is within the scope of the law of Congress, and that being the matter which must be first determined a suit by or against the corporation is one which involves a construction of the terms of its charter; in other words, a question arising under the law of Congress. But that argument is not pertinent here. The right of the contestants in an adverse suit, as we have seen, does not always call for any construction of an act of Congress. It may depend solely on local rules or customs or state statutes, and in that case does not involve a dispute or controversy "which depends upon the construction or effect of the Constitution, or some law or treaty of the United States." "In most actions concerning mining claims, the parties agree as to the proper rule of construction to be applied to the mining laws, and the controversies are usually limited to questions of fact relating to the compliance with these laws. In such cases the Federal courts have no original jurisdiction, unless there is a diversity of citizenship; but in cases arising under section twenty-three hundred and twenty-six of the Revised Statutes, the *authority* for the action is found in the legislation of Congress. Without this authority the action for the purposes avowed by the statute could not be maintained." 2 Lindley on Mines, sec. 748. A statute authorizing an action to establish a right is very different from one which creates a right to be established. An action brought under the one may involve no controversy as to the scope and effect of the statute, while in the other case it necessarily involves such a controversy, for the thing to be decided is the extent of the right given by the statute.

Again, it is said that this adverse suit is one step in the administration of the laws of the United States in respect to mineral lands, and therefore it must be presumed that Congress intended that such step should rightfully be taken in one of the courts of the United States. This suggestion was open to the

consideration of Congress when it was determining where the adverse suit should be brought, but that it did not consider it vital is evident from the conceded fact that unless the amount in controversy is over $2000, no jurisdiction attaches to the Federal court. In other words, Congress did not deem the matter of the jurisdiction of those courts so essential a part of the administration of the land laws of the United States as to vest in them jurisdiction of all such controversies, but left a large if not a major portion of them to be determined in the state courts. It evidently contemplated the fact that a controversy about a right of possession might as appropriately be decided in a state as in a Federal court, and, not prescribing in which court it should be litigated, left the matter to be determined by the ordinary rules in respect to the jurisdiction of the Federal courts.

Counsel also calls our attention to the difference in the procedure in the disposal of agricultural and mineral lands. With respect to the former all proceedings are carried on in the Land Department, and it is only after the legal title has passed by patent that inquiry is permissible in the courts, while in respect to the latter the aid of the courts is invoked before the issue of a patent and in order to determine to some extent the right thereto. Noticing this distinction he also notes the fact that a contest in respect to the validity of a patent for agricultural lands can be litigated in the Federal courts, and hence draws the inference that a contest preliminary to a patent for mineral lands, and involving the right thereto, must also be one which can be litigated in the same courts. But we think the true inference from this difference of procedure is to the contrary, because, in respect to agricultural lands, it is settled that all questions of fact are determined by the Land Department, and that after the issue of a patent only questions of law are open for consideration in the courts, and as the laws of Congress alone determine the matter of the disposal of the public lands it follows that the questions of law which are thus open for consideration are those arising under the acts of Congress. While on the other hand, as we have heretofore shown, in these adverse suits preliminary to a patent of mineral lands not merely ques-

tions of law arising under the statutes of the United States, but questions of fact and questions arising under local rules and customs and state statutes are open for consideration. The scope of the inquiry which is permissible in the two cases emphasizes the fact that in the latter case the controversy may be one not arising under the Constitution or laws of Congress.

Again, it is said that Congress has in these cases prescribed a specific rule of limitation which is ordinarily different from that obtaining under state statutes in respect to actions for the recovery of possession; that it has authorized decrees in peculiar form, some partly for and partly against each of the different parties, and also some adversely to both. Act of March 3, 1881, c. 140, 21 Stat. 505; *Richmond Mining Co.* v. *Rose*, 114 U. S. 576, 585; *Perego* v. *Dodge*, 163 U. S. 160, 167. But incidental matters such as these are not decisive, especially as confessedly the statute leaves the jurisdiction over those cases in which the matter in controversy does not exceed $2000 in value in the state Courts. This fact shows conclusively that Congress was not intending to carve out a new jurisdiction for the Federal courts, and also that it did not doubt that the state courts would carry into effect its enactments in reference to limitations and procedure.

And, finally, it is said that Congress cannot confer any jurisdiction on the state courts, that they may decline to entertain these adverse suits, and that Congress cannot compel them to do so. But here again we are met with the fact that Congress has left all controversies in respect to right of possession not exceeding $2000 in value to the state courts. It evidently proceeded upon the supposition (which is a rightful one) that, as by the express terms of the Constitution, article 6, clause 2, "This Constitution, and the laws of the United States which shall be made in pursuance thereof; . . . shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding," no courts, national or state, would decline to carry into effect the acts of Congress. Whether if a state court should refuse to act under these statutes the matter is one which could be corrected by error in this court, is immaterial.

If it shall appear that state courts decline to entertain such jurisdiction, and that it cannot be enforced upon them, Congress may further legislate. Evidently, thus far in these cases, as in many others, there has been no reason to suppose that any state court would decline to enforce the laws of the United States or to carry into effect their provisions. And as was well said by Mr. Justice Miller, in *Iron Silver Mining Co.* v. *Campbell*, 135 U. S. 286, 299:

"The purpose of the statute seems to be that where there are two claimants to the same mine, neither of whom has yet acquired the title from the government, they shall bring their respective claims to the same property, in the manner prescribed in the statute, before some judicial tribunal located in the neighborhood where the property is, and that the result of this judicial investigation shall govern the action of the officers of the Land Department in determining which of these claimants shall have the patent, the final evidence of title, from the government."

If every adverse suit could be taken into the Federal courts, obviously in some of the larger Western States the litigation would not be "before some judicial tribunal located in the neighborhood where the property is," for in them the Federal courts are often held only in the capital or chief city of the State, and at a great distance from certain parts of the mining regions therein.

So, we conclude, as we did in the prior case, that, although these suits may sometimes so present questions arising under the Constitution or laws of the United States that the Federal courts will have jurisdiction, yet the mere fact that a suit is an adverse suit authorized by the statutes of Congress is not in and of itself sufficient to vest jurisdiction in the Federal courts.

It appears that there were two cases in the Circuit Court of Idaho, that they were there consolidated for trial, and the consolidated case taken on appeal to the Circuit Court of Appeals. Of the two original cases, No. 81, on the docket of the Circuit Court, was commenced by the appellees in that court. The other, No. 103, was commenced by the appellant in the district court of the first judicial district of the State of Idaho in and

for Shoshone County, and by the appellees removed to the Federal court. The matters involved in the two cases were similar, and hence the consolidation. Under these circumstances, and in view of the conclusion to which we have arrived, the order will be that

The judgment of the United States Circuit Court of Appeals for the Ninth Circuit is reversed, and the case remanded to the Circuit Court, Northern Division, District of Idaho, with instructions to reverse its decree and enter a decree dismissing Case No. 81, *and an order remanding Case No.* 102 *to the state court.*

MR. JUSTICE MCKENNA dissented.

MR. JUSTICE WHITE did not hear the argument and took no part in the decision of this case.